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No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF SANTA MARIA, CALIFORNIA, ET AL.,
Petitioners,

v.

ESPERANZA RUIZ, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding that the election of a minority preferred Anglo candidate who was the first choice of minority voters deserves less evidentiary weight than the defeat of a minority candidate who was the second preference of minority voters, in a Section 2 Voting Rights Act case?

2. Whether the Ninth Circuit erred in ruling that a district court, in applying the "special circumstances" doctrine, may disregard the election of minority candidates during the pendency of voting rights litigation, when those minority candidates were the preferred candidates of minority voters, and there is *no evidence* that the minority candidates' election was the result of white efforts to thwart the lawsuit, or the result of any other factors related to race?

PARTIES TO THE PROCEEDING

The parties to this case are plaintiffs Esperanza Ruiz, Joseph Talaugon, Iltra Garcia, and Francisco Delgado and defendants City of Santa Maria, City Council of Santa Maria, Roger Bunch, Toru Miyoshi, Joseph Centeno, Abel Maldonado, Bob Orach, City Council members, and Janet R. Kalland, City Clerk; all sued in their official capacities.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The City of Santa Maria respectfully petitions for a writ of certiorari to reverse the judgment, or portions of the judgement, of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 160 F.3d 543. The order of the court of appeals denying the City of Santa Maria's petition for rehearing with suggestion for en banc review (App., *infra*, 36a-37a) is unreported. The court of appeals order staying mandate (App., *infra*, 38a) is unreported. The relevant opinion of the district court (App., *infra*, 39a-53a) is unreported.

JURISDICTION

The court of appeals opinion was issued on November 5, 1998. The court of appeals order denying the petition for rehearing with suggestion for rehearing en banc was entered on February 23, 1999. The court of appeals order granting a Rule 41(b) request for stay of the mandate for its judgment was entered on March 15, 1999. (App., *infra*, 38a.) The jurisdiction of this court is invoked under 29 U.S.C. section 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, provides, in part, that

> "(a) No voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . . (b) A violation of . . . this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . . *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

STATEMENT OF THE CASE

This is a case in which four Hispanic citizens of the City of Santa Maria challenge the legality of the City's at-large system of electing City Council members under Section 2 of the federal Voting Rights Act, 42 U.S.C. § 1973, because it allegedly "dilutes" the ability of Hispanic voters to elect candidates of their choice.

Vote dilution occurs when: (a) a minority group is unable to elect its candidates at large, (b) whom it could elect in a single member district where that group is an effective voting majority. *Thornburg v. Gingles*, 478 U.S. 30, 68, 106 S.Ct. 2752 (1986). Hispanic plaintiffs therefore seek to invalidate Santa Maria's at-large City Council system election, and replace it with a single member district system.

The district court, on its own motion, issued an order to show cause as to why the case was not moot when the 1994 elections for City Council resulted in the election of 2 Hispanics to the two open Council seats that year on the 5 member City Council (consisting of 4 Council members and one mayor). After briefing, the district court issued an order dismissing the case as moot, and also granted the City of Santa Maria's motion for summary judgment, based on plaintiffs' inability to prove that white bloc voting usually defeats the preferred candidates of Hispanic voters, as required under *Thornburg, supra*.

The court of appeals reversed the district court judgment on both legal grounds and remanded the case back to the district court for trial, in an opinion enunciating unprecedented new legal standards on what evidence is relevant and how evidence should be weighed in a Section 2 case, that was intended to govern the trial court on remand.

One of three panel judges, J. Wallace, dissented from these sections of the Court of Appeals opinion (parts IV.B (App., *infra*, 14a-18a) and IV.D (App., *infra*, 21a-26a)). Petitioner and defendant City of Santa Maria filed a petition for rehearing to delete parts IV.B and IV.D of the opinion, which was denied.

Thus, it is these new legal restrictions on evidence in Section 2 cases set forth in parts IV.B and IV.D of the Court of Appeal opinion which the City of Santa Maria seeks a writ of certiorari to reverse.

A. Statement of Facts

Santa Maria is a California general law city that is located in Santa Barbara County. Since its incorporation in 1905, it has employed an at-large or citywide electoral system to elect its City Council. (App., *infra*, 2a.)

There are four City Council seats and a mayor who is separately elected, also citywide. City Council elections are held every two years at which time two of the four seats on the Council are filled. The candidates receiving the two highest vote totals of all candidates running are elected to the City Council for four year terms of office. There is no majority vote requirement and no runoff requirement. (App., *infra*, 2a.)

In Santa Maria voters may cast two ballots in each election for the two open Council seats, but there is no "anti-single shot" requirement that they must do so for their ballot to count. If they so choose, Hispanic voters may "bullet vote" or cast just one ballot for a single candidate and deny Anglo candidates their other vote, thereby improving the chances of electing the Hispanic candidate. (App., *infra*, 2a.)

Under Santa Maria's election system, the mayor is separately elected every two years. The mayor's race is a single seat election in which by definition single shot voting is not possible. The mayor is elected by plurality vote. (App., *infra*, 2a.)

In three of the last four City Council elections studied by the parties' experts, the first preference of Hispanic voters was elected: Tom Urbanske in 1988 and 1992 and Abel Maldonado in 1994. In the November, 1994 City Council election both Hispanic preferences were elected to the two seats up for election: Abel Maldonado and Joe Centeno. The two Anglo preferences were Anglo incumbent Bob Orach and Joe Centeno. Thus, Hispanic voters elected both their preferences in this election, while Anglos elected only one of theirs. Maldonado was elected despite the fact that he was not an Anglo preference and would not have been elected if only Anglo votes were counted. Hispanics vetoed the Anglo first preference, Anglo incumbent Bob Orach, who received only minimal support from Hispanics. Hispanics also elected their preferred candidate for Mayor in 1994. (App., *infra*, 3a-5a, 5a fn.8, 28a-29a, 57a-59a.)

Joe Centeno who was elected in 1994 has lived in Santa Maria nearly all his life, was with the City's Police Department for 35 years and was Chief of Police for 10 years. Plaintiffs concede that his election was not a fluke and that he would be a formidable candidate any time he chose to run. Abel Maldonado is a young Hispanic businessman and Republican who grew up in Santa Maria and whose family has been in Santa Maria for years. He spent more money than any other candidate in the history of Santa Maria City Council elections. (App., *infra*, 55a-57a, 60a-63a, 67a-69a.) The Court of Appeal ruled that the trial court should focus on the amount of *Anglo* financial support he received ($6,625) (App., *infra*, 26a), without acknowledging that *Hispanics*,

including Maldonado and his family, spent an unprecedented amount of money ($25,362) on his election, more money in fact than any Anglo candidate ever spent. (App., *infra*, 74a-78a.)

There was no evidence that Anglos voted for Maldonado and Centeno to end the lawsuit, or that Anglos endorsed them or contributed money to their campaigns to end the lawsuit. *None of the candidates believed that the lawsuit affected the outcome of the 1994 election.* (App., *infra*, 21a, 55a-57a, 61a-62a.)

Hispanics also were not injured by the 1992 election. Both Anglos and Hispanics elected their first and third preferences. 38.4% of Hispanics supported Urbanske in that election, 35.9% voted for Fernando Castillo and 31.5% for Toru Miyoshi. Urbanske, who was the Hispanic first preference, and Miyoshi were elected. The Anglo preferences in this election were Urbanske and Anglo incumbent Dan Firth who was defeated. Miyoshi was the third preference of both Hispanics and Anglos, and was elected because he received some support from Hispanics but Firth did not. Hispanics therefore vetoed the Anglo second preference. (App., *infra*, 4a, 28a, 58a-59a.)

In 1990, the Hispanic first preference was Gil Guevara who lost. Anglo incumbents Curtis Tunnel and Bob Orach were elected. In 1988, the Hispanic preferences were Tom Urbanske who was elected and Hispanic Felix Martel who was not. Both Anglo preferences, incumbent Tom Urbanske and former Councilman Dan Firth, were elected. (App., *infra*, 3a, 28a.)

Of eight seats elected in these four City Council elections, then, Hispanics elected at least four of their preferences, five if Miyoshi is counted. At the time judgment in

the district court was entered, the City Council had three minorities: Abel Maldonado and Joe Centeno who are Hispanic, and Toru Miyoshi who is Asian. At least three of the four elected members of the Council at that time were Hispanic preferences: Maldonado, Centeno and the Mayor, four if Miyoshi is counted. (App., *infra*, 5a fn.8, 28a-29a.)

Subsequent to judgment in the trial court, another City Council election was held in November, 1996. Abel Maldonado, an Hispanic who won a four year City Council seat in 1994, was elected mayor. (App., *infra*, 7a fn.13.)

Santa Maria's total population composition in 1990 was as follows:

Anglo	46.4%
Hispanics	45.7%
Black	1.9%
Asian, Pacific Islander, Other	5.9%

The Hispanic population has increased significantly in recent years. In 1970, for example, Santa Maria had a total population of 32,749, of which 8,819 or 27% were Hispanic. By 1990, Santa Maria had grown to a city of 61,284, of which 28,014 or 46% were Hispanic. Thus, the number of Hispanics in Santa Maria more than doubled between 1980 and 1990 and more than tripled between 1970 and 1990. (App., *infra*, 2a, *see also*, 65a-66a.)

Plaintiffs were able to create but one proposed *Thornburg* remedial district containing a quarter of Santa Maria's total population and in which Hispanics are a 57% majority of the voting age citizens as of 1990. Non-Hispanics or Anglos would be a majority of the voting age

citizens and registrants in the other three Council districts. (App., *infra*, 72a.).

REASONS FOR GRANTING THE PETITION

Petitioner City of Santa Maria seeks certiorari to reverse two rulings in the November 5, 1998 Ninth Circuit opinion that plainly are contrary to Supreme Court and Circuit Court voting rights decisions. More specifically, the City seeks to delete parts IV.B and IV.D of the majority opinion setting forth plainly erroneous legal standards to guide the trial court on remand on what evidence to consider and what weight to be given evidence in a Section 2 voting rights case. One of the panel members (Wallace, J.) dissented from these two sections of the opinion.

Certiorari is appropriate because the holdings in these two sections of the majority opinion overlook material points of law and are directly contrary to prior decisions of the Supreme Court, the Ninth Circuit and other Circuits, including a recent Sixth Circuit opinion not addressed by the panel decision. Review is appropriate to secure uniformity of Circuit decisions and because each of the two challenged rulings substantially affects a rule of national application as to which there is an overriding need for national uniformity.

To prevail in this matter alleging violation of Section 2 of the Voting Rights Act, plaintiffs must prove, based on the "totality of circumstances," that Santa Maria's at-large City Council electoral system "results" in the "dilution" of Hispanic voters' electoral opportunities, 42 U.S.C. § 1973. Vote "dilution" occurs when: (a) a minority group is unable to elect its preferred candidates at large, (b) whom it could have elected in a single member district where that group is an "effective" voting majority. *Thornburg*, *supra*, 478 U.S. at 68, 106 S.Ct. at 2775.

After ruling correctly that the minority group's preferred candidate need not be a minority in a Section 2 vote dilution case (Part IV.A.1 of the Opinion, App., *infra*, 11a-13a), the panel majority then declared that the success of an Anglo candidate who in this case was minority voters' first preference in Santa Maria's 1988 and 1992 multi-seat elections deserves less evidentiary weight than the defeat of minority candidates who were the second preference of minority voters in each of those elections. (Part IV.B of the Opinion, App., *infra*, 14a-18a.) This novel legal standard which is unsupported by any case law contravenes settled Supreme Court voting rights jurisprudence. It also denies the legitimacy of expressed minority voter preferences in actual elections in contravention of Supreme Court precedent and engages in the kind of racial stereotyping frequently condemned by this Court.

The majority opinion, if allowed to stand, threatens to produce unsound decisions in this and future voting rights cases in the Ninth Circuit and to undermine the validity of previous voting rights decisions in the Ninth Circuit and elsewhere. Additionally, the Sixth Circuit recently issued an opinion directly contrary to the result here, which the panel majority overlooked.

The panel majority also authorized the trial court on remand to discount elections won by Hispanics during the pendency of this litigation, even when there is *no evidence* that post-litigation Hispanic successes were engineered to thwart the lawsuit or were otherwise the result of *racial* factors. This ruling is directly contrary to Supreme Court, Circuit Court and Ninth Circuit decisions. Some of the decisions, overlooked by the panel majority, hold that the express language of the Voting Rights Act defines "dilution" to be an injury "on account of race or color," in the absence of which

federal courts have no jurisdiction, and would be acting unconstitutionally, to intervene in local electoral processes.

Finally, the two rulings were unnecessary to the result and, as the dissenting panel member notes, they "usurp" the discretion of the trial court to consider and weigh evidence. The City therefore urges review of this Ninth Circuit panel opinion to avoid an unsound decision on remand that may result in yet another appeal and subsequent retrial.

A. The Panel Majority, In According Less Weight to Minority Preferred Anglo Candidates, Departs from Settled Voting Rights Law, Usurps the Trial Court's Role in Weighing Evidence and Is Unnecessary to the Result

The trial court granted summary judgment on the ground that plaintiffs could not prove that white bloc voting usually defeated the preferred candidates of minority voters, one of the three "necessary preconditions" plaintiffs must prove to prevail in a Section 2 vote dilution case under *Thornburg*, *supra*, 478 U.S. at 50-51.

Those preconditions are:

1. *The minority group must be sufficiently large and geographically compact to constitute an effective voting majority in a single member district.* Under this first precondition, plaintiffs must create a hypothetical, single member district in which Hispanics will constitute an "effective voting majority." *Id.* at 38. The rationale for the requirement is that unless plaintiffs are "able to elect" in a single member district, the at-large system "cannot be responsible for minority voters' inability to elect." *Id.* at 50.

2. *The minority group is politically cohesive.* If Hispanics are not politically cohesive, then "it cannot be said that the selection of a multimember electoral structure [at-large system] thwarts distinctive minority group interests." *Id.*

3. *The white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, to usually defeat the minority's preferred candidate.* *Id.* at 48-51. Plaintiffs must prove more than racially polarized or white bloc voting. To be *legally significant*, white bloc voting must "regularly defeat the choices of minority voters". *Id.* at 48.

Failure to prove any of the three *Thornburg* preconditions is fatal to the plaintiffs' Section 2 claim. This Court, moreover, has ruled that even if plaintiffs prove each one of *Thornburg*'s three preconditions, they cannot prevail unless the "totality of the circumstances" demonstrates that a current condition of vote dilution exists, *i.e.*, that the minority group does not have an equal opportunity to participate in the electoral process and elect candidates of its choice. *Johnson v. De Grandy*, 512 U.S. 997, 1011, 114 S.Ct. 2647, 2657 (1994) (" . . . if *Gingles* so clearly defined the three as generally necessary to prove a § 2 claim, it just as clearly declined to hold them sufficient in combination"). Ultimately, for plaintiffs to prevail in a Section 2 case, the Court after considering the totality of the circumstances must make a finding of "vote dilution." *Thornburg*, *supra*, 478 U.S. at 77-79.

In three of the four City Council elections addressed by the Court of Appeals, the first preference of Hispanic voters was elected: Urbanske in 1988 and 1992, and Maldonado in 1994. Of eight City Council seats elected in these four elections, Hispanics elected at least four of their preferences, five if Miyoshi is counted. Maldonado was elected despite

the fact that he was not an Anglo preference, and would not have been elected if only Anglo votes were counted. Hispanic voters defeated Anglo incumbents in 1992 (Firth) and in 1994 (Orach) and were the decisive factor in defeating George Hobbs for mayor in 1994. At the time of the trial court decision, the Council had three minorities: Maldonado, Centeno and Miyoshi. (App., *infra*, 28a-29a, 58a-59a.)

Despite this undisputed evidence, the Ninth Circuit opinion reversed the trial court's decision granting summary judgment and remanded the case for trial, setting forth legal standards to guide the trial court in applying the third *Thornburg* precondition. The panel majority, in ruling that the success of a minority preferred non-minority candidate is entitled to less evidentiary weight than the defeat of a minority preferred minority candidate (part IV.B, App., *infra*, 14a-18a), obscured the true issue raised by the undisputed facts of this case. This is not a case about white only elections in which minority voters had no minority candidates to support. Nor is it a case about a multiseat election system in which minority voters' first preference was a sole minority candidate who lost and whose second preference had to be an Anglo candidate because there were no other minority candidates available to choose.

This case involves elections in 1988 and 1992 in which Hispanic voters' first preference was an Anglo who won, and their second preference was an Hispanic who lost. These were racially contested elections in which Hispanics gave more votes to the Anglo candidate than to the minority candidate.

As the panel majority acknowledges, the Supreme Court in *Thornburg* split on whether the race of the candidate is irrelevant in a Section 2 vote dilution case, but since then the Circuits uniformly have held that a minority preferred

candidate need not be a minority, a position the panel opinion also embraces (Part IV.A.1, App., *infra*, 11a-12a). None of these Circuit decisions, moreover, adopted the panel majority's rule that minority preferred Anglo candidates are to be accorded less evidentiary weight, which clearly is at odds with these decisions. Indeed, Judge Wallace, dissenting, notes that there is "considerable tension" between Parts IV.A.1 and IV.B of the panel opinion. (App., *infra*, 31a.)

The panel majority, moreover, overlooked the Supreme Court's admonition against racial stereotyping. Condemning racial gerrymanders because they bear an "uncomfortable resemblance to political apartheid," Justice O'Connor noted that a racial stereotype "reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and *will prefer the same candidates at the polls*. We have rejected such perceptions elsewhere as impermissible stereotypes." *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 2827 (1993) (emphasis supplied). The panel majority also overlooked a similar admonition in *Johnson v. De Grandy*, *supra*, 512 U.S. at 1020, 114 S.Ct. at 2661, where Justice O'Connor recognized that minority voters must "pull, haul and trade to find common political ground" with coalitions consisting of voters from other racial and ethnic groups to elect candidates of choice "who may not represent perfection to every minority voter." *See also NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1016 (2d Cir. 1995) (to hold that a nonminority cannot be a minority preferred candidate would be "electoral apartheid"); *Lewis v. Alamance County*, 99 F.3d 600, 607 (4th Cir. 1996), *cert. denied*, 520 U.S. 1229, 117 S.Ct. 1820 (1997) (presumption that minority voters prefer minority candidates disenfranchises minority voters who do not). There is no way to square these condemnations of racial stereotypes with the panel majority's standard.

Indeed, Judge Wallace, dissenting, notes that the majority, in elevating a minority preferred minority candidate to a higher status merely because of his or her race, "embraces the very view of 'electoral apartheid' that it rejects in Part IV.A.1." (App., *infra*, 31a.)

Ninth Circuit cases have accorded minority preferred Anglo candidates the same evidentiary weight as minority preferred minority candidates. In *Valladolid v. City of National City*, 976 F.2d 1293 (9th Cir. 1992), the Ninth Circuit treated the election of minority preferred Anglo candidates as dispositive (*id.* at 1296-97), and, as to losing minority candidates, noted that "appellants too easily equate the presence or absence of minority individuals on the council with the victory or defeat of minority-preferred candidates." *Id.* at 1297. *See also Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), where the minority preference for Anglo candidates was fatal to plaintiffs' claims, and *Aldasoro v. Kennerson*, 922 F. Supp. 339, 348, 362 (S.D. Cal. 1995) in which Hispanic preferred Anglo candidates who won were given the same evidentiary weight as Hispanic preferred Hispanic candidates who lost.

The panel majority cited *Gomez v. Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080, 109 S.Ct. 1534 (1989) as contrary to *Valladolid* but all that can be gleaned from *Gomez* is that Hispanic voters in that case *always* chose Hispanic candidates as their first preference whenever they ran for City Council, which are not the facts in this case. *Gomez*, moreover, conflicts with the panel majority's ruling because of its instruction that minority political cohesion is to be determined "on the basis of voting preferences expressed in actual elections" (*id.* at 1415) and that courts are to look "only to *actual voting patterns*," *id.* at 1416, an instruction the panel majority's new legal standard offends.

Thus, the panel majority not only dictates application of an erroneous legal standard on remand in this and future voting rights cases, but undermines the validity of previously decided Ninth Circuit cases and district court decisions within the Ninth Circuit.

The decisions of other Circuits cited by the panel majority are inapposite. *Jenkins v. Red Clay Consol. School Dist. Bd of Educ.*, 4 F.3d 1103, 1128 n. 22 (3d Cir. 1993), *cert. denied*, 512 U.S. 1252, 114 S.Ct. 2779 (1994), and *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark.) (three judge panel), *aff'd*, 488 U.S. 988, 109 S.Ct. 548 (1988) addressed the subject of white only elections, which are not the facts here. Nor did *Citizens for a Better Gretna v. City of Gretna, Louisiana*, 834 F.2d 496, 502 (5th Cir. 1987), *cert. denied*, 492 U.S. 905, 109 S.Ct. 3213 (1989), accord greater weight to the defeat of black candidates.

The panel majority says that "the Sixth Circuit alone has addressed this issue" in *Clarke v. Cincinnati*, 40 F.3d 807 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109, 115 S.Ct. 1960 (1995), but *Clarke* dealt with a complex proportional representation election system not remotely like Santa Maria's system and the opinion never makes clear whether black preferred Anglo candidates received greater black support than losing black preferred black candidates, as occurred in Santa Maria in 1988 and 1992. Indeed, the same Sixth Circuit on June 1, 1998 issued an opinion, overlooked by the majority, squarely rejecting the panel majority's new standard. *Cousin v. Sundquist*, 145 F.3d 818, 825 (6th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1026 (1999) ("The proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority preferred candidates, whatever their race, usually lose"). The Sixth Circuit did not give greater evidentiary weight to minority preferred minority candidates. There is no authority to support the panel

majority's legal standard which is a racial stereotype that denies the legitimacy of minority voters' expressed voting preferences, and is contrary to *Gomez* and common sense.

Judge Wallace also articulates concern about the workability of the majority's standard, and about the invasion of the trial court's discretion to determine in the first instance the weight to be given to particular election results. As the panel majority acknowledges, Hispanics cast the deciding vote in the 1994 mayoral election in support of a white candidate who defeated the long time mayor whom Hispanics regarded as unsympathetic to their interests. The panel majority's standard would give less weight to this important election than to the defeat of Hispanic voters' second preference in 1992 who was Hispanic. This would be true even though Hispanics, who preferred an Anglo candidate more than a Hispanic candidate, and preferred an Asian candidate nearly as much as the Hispanic candidate, were not very cohesive in that election. *East Jefferson Coalition for Leadership and Development v. Jefferson Parish*, 691 F. Supp. 991, 1003 (E.D. La. 1988) (Black candidate not Black preference because Black voters split their vote evenly among one Black and two White candidates).

The panel majority's standard, then, inherently conflicts with the second *Thornburg* precondition of minority political cohesion, giving more weight to lesser supported minority candidates over more highly supported nonminority preferences. By overriding the trial court's discretion in according proper evidentiary weight to such elections, the panel majority's standard also conflicts with the "totality of circumstances" inquiry that is a mandatory element of a Section 2 vote dilution case. *Johnson*, *supra*, 512 U.S. at 1009-13, 114 S.Ct. at 2656-58 (even if plaintiffs prove each of the three *Thornburg* preconditions, they cannot prevail unless the "totality of circumstances" demonstrates that the minority

group does not have an equal opportunity to elect representatives of their choice).

It further conflicts with the ultimate finding of vote dilution that trial courts must make. *Thornburg*, *supra*, 478 U.S. at 77-79. Vote dilution occurs when (a) a minority group is unable to elect its candidates at large (b) whom it could elect in a single member district. *Id.* at 68. Vote dilution is a comparative inquiry that measures a minority group's ability to elect under the existing system against some "alternative system that would provide greater electoral opportunity to minority voters," which under *Thornburg* is single member districts. *Holder v. Hall*, 512 U.S. 874, 887, 114 S.Ct. 2581, 2589 (1994) (O'Connor concurring). Vote dilution, then, examines the lack of success of minority preferred candidates under the existing electoral arrangement, "when compared with the success that would be predicted under the measure of undiluted minority strength." *Id.* (O'Connor concurrence, quoting her opinion in *Thornburg*).

In this case, plaintiffs admitted that Hispanics could not form the majority of voters in more than one district in a four district plan. (App., *infra*, 72a[1]). Given plaintiffs' assertion of polarized voting in Santa Maria, Hispanics would not expect to elect but one preferred candidate every four years in a district election system. Thus, in 1988 and 1992 the Hispanic second preference would not have been elected anyway in an alternate system. By definition, there was no vote dilution. Only the first preference of Hispanic voters in 1988 and 1992 matters to the dilution analysis. Thus, the

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[1] "Defendants [City of Santa Maria, *et al.*] claim that 'Non-Hispanics or Anglos would be a majority of the voting age citizens in the other three districts.' . . . Plaintiffs [Ruiz, *et al.*] do not at this time dispute this fact . . ." This document, number CR 237 in the District Court docket, was included in the record before the Ninth Circuit.

panel majority's legal standard, by giving greater weight to the defeat of an Hispanic second preference which could not constitute "dilution" as a matter of law, is wholly unworkable and at odds with Supreme Court vote dilution jurisprudence.

B. The Panel Majority's Special Circumstances Standard Overlooks Settled Voting Rights Jurisprudence

Part IV.D of the panel's majority decision (App., *infra*, 21a-26a) holds that minority electoral successes can be disregarded under the "special circumstances" doctrine, even when plaintiffs are unable to prove that those successes were engineered to thwart pending voting rights litigation or that they occurred on the basis of some reason related to *race*. By directing the trial court to discount minority electoral successes on the basis of wholly *nonracial* factors, the panel majority unhinges Section 2 vote dilution analysis from its jurisdictional and constitutional underpinnings and violates prior Supreme Court and Ninth Circuit case law.

Thornburg held that an isolated minority success should be given less probative value if explained by "special circumstances." 478 U.S. at 57. Examples of special circumstances are a minority candidate running unopposed (a racially uncontested election), incumbency or because of pending litigation, Anglos give unusual organized support to minority candidates *in order to defeat the lawsuit*. *Id.* at 76, esp. at n. 37. Courts have disregarded or given less weight to elections won by minorities after the initiation of a voting rights suit, on proof that Anglos manipulated the election of a safe minority candidate (*id.* at 75) or where a minority candidate prevailed because of "unusual organized political support by white leaders *concerned to forestall single member districting*." 478 U.S. at 76 (emphasis supplied). *See also Valladolid*, *supra*, 976 F.2d at 1298 ("pending voting rights

litigation might lead majority politicians and voters to support a minority candidate *in an effort to defeat the lawsuit*") (emphasis added); *NAACP v. City of Niagara Falls*, *supra*, 65 F.3d at 1021 (no evidence of any attempt by white voters to thwart litigation).

As the panel majority acknowledges, plaintiffs concede that there is no evidence that the success of two Hispanic Council candidates in 1994 was due to the pendency of the lawsuit. (App., *infra*, 21a.) None of the candidates believed that the lawsuit had any impact on the outcome of the election. There was no evidence that any Anglo voted for the two minority candidates to secure a dismissal of the lawsuit or gave money or endorsed them for that purpose. Plaintiffs' own political scientist Dr. Engstrom admitted that one of the candidates (Centeno) had high name recognition, was thought of highly in the community and did not need district elections to get elected. Hispanic citizens contributed more money to the other minority candidate's campaign than any Anglo candidate ever spent in prior elections. Dr. Engstrom also admitted that it is plausible that the two minority candidates won, and prior candidates lost, not because of racial reasons but because of differences between the candidates. Given recent increases in Hispanic population, citizenship and registration, Dr. Engstrom also conceded that the 1994 election was more probative of current Hispanic ability to elect than the 1988 election. (App., *infra*, 61a-66a.) Case law gives more weight to recent elections where there have been significant demographic changes, as have occurred here. *Rollins v. Fort Bend Indep. School Dist.*, 89 F.3d 1205, 1220 (5th Cir. 1996) (older elections discounted because of dramatic population changes); *Vecinos De Barrio Uno ("Uno") v. City of Holyoke*, 72 F.3d 973, 989-90 (1st Cir. 1995) (district court may have undervalued import of increasing Hispanic population and political participation); *Al-*

dasoro, *supra*, 922 F. Supp. at 360, 362 (more recent elections more probative).

Lacking any evidence that the two minority candidates won because of the pendency of the lawsuit, plaintiffs contended that the 1994 election was aberrational and should be discounted on the basis of purely *nonracial* factors such as higher Anglo voter support and financial contributions than Hispanic candidates received in prior elections. The panel majority opinion erroneously adopted that standard (part IV. D, App., *infra*, 24a-25a). These facts are insufficient as a matter of law to warrant application of the special circumstances doctrine, and worse would preclude other racially neutral explanations that Centeno and Maldonado were stronger candidates who ran better campaigns than previous Hispanic candidates, or were due to Hispanic demographic increases.

No case ever discounted an election under the special circumstances doctrine based on such racially neutral factors. As a matter of law, plaintiffs *must* prove that the victories by the two minority candidates are aberrational *in the sense that they are the product of race*, rather than because of racially neutral factors like the amount of money spent. This was made clear in several recent Circuit decisions that the Panel majority overlooked. The Eleventh Circuit in *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083, 115 S.Ct. 1795 (1995), explains that under the express language of Section 2 plaintiffs must demonstrate that a minority electoral defeat (or success) occurred *on account of race or color*, "not on account of some other racially neutral cause." To hold otherwise would be to read the words "on account of race or color" out of Section 2 and create a de facto right to proportional representation explicitly prohibited by Section 2. *Id.* at 1516. The standard adopted by the Eleventh Circuit "simply allows a defendant to rebut

proof of vote dilution by showing losses by minority preferred candidates are attributable to nonracial causes." *Id.* at 1526. *See also League of United Latin American Citizens ("LULAC") v. Clements*, 999 F.2d 831, 854, 855-57 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071, 114 S.Ct. 878 (1994) (partisan affiliation not race explains minority electoral losses; therefore no dilution); *Uno*, *supra*, 72 F.3d at 980-84. The Ninth Circuit also has adopted this view in *Smith v. Salt River Project Agr. Imp.*, 109 F.3d 586, 596 (9th Cir. 1997), which cannot be squared with the panel majority's decision.

The panel majority inexplicably holds that proof of discriminatory motive to thwart the lawsuit "has no part in a vote dilution claim." This ruling is contradicted by the express language of *Thornburg*, *supra*, 478 U.S. at 76 and n.37, *Smith*, *supra*, 109 F.3d at 596, and *Valladolid*, *supra*, 976 F.2d at 1298. Additionally, the "intent" issue removed by amended Section 2 in 1982 was the requirement imposed in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490 (1980) to prove racial motivation in the adoption and maintenance of an at-large election system. *Nipper*, *supra*, 39 F.3d at 1522; *LULAC*, *supra*, 999 F.2d at 862; *Uno*, *supra*, 72 F.3d at 982. Justice Brennan wrote in *Thornburg*, *supra*, 478 U.S. at 63-74, that the reasons why voters vote as they do is irrelevant to a Section 2 claim but his opinion did not command a majority. Justice O'Connor's disserting view that causation is relevant to the overall dilution inquiry (*id.* at 100-101) has prevailed with the Supreme Court's decision in *Johnson*, *supra*, 512 U.S. at 1009-13, that *requires* examination of other factors under the "totality of the circumstances" before reaching a conclusion about dilution. Thus, courts are obliged under the "totality of circumstances" test to determine whether minority electoral losses (or successes) are the result of racial factors or explainable on non-racial grounds. *LULAC*, *supra*, 99 F.2d at 850-55, 862-63; *Nipper*, *supra*, 39 F.3d at 1512-17, 23-26; *Uno*, *supra*, 72 F.3d at 979-83; *Lewis*

v. Alamance County, *supra*, 99 F.3d at 615 n. 12. Were it otherwise, every election would be aberrational because every election is "unique" or different in some nonracial manner. *Clarke*, *supra*, 40 F.3d at 813-14; *Rollins*, *supra*, 89 F.3d at 1213-14 (rejecting a standard that would require every minority electoral success to fit a special circumstance).

The panel majority directs the trial court to consider increased Anglo voter support for the two minority candidates without determining whether that increased support was due to nonracial factors such as the strengths of the candidates and of their campaigns, or to some factor related to race, such as an attempt to thwart the lawsuit. This plainly denies a defendant the opportunity to demonstrate that minority candidate's election was attributable to racial factors. As the authorities make clear, federal courts have no jurisdiction statutorily or constitutionally under the Voting Rights Act unless a result occurs "on account of race or color." *Nipper*, *supra*, 39 F.3d at 1515-16. The panel majority entirely overlooked these seminal principles of national application, relying on a distant Fourth Circuit case decided before *Smith*, *LULAC*, *Nipper* and *Uno*, and before the Fourth Circuit itself adopted the causation analysis of those cases, thereby implicitly overruling *Collins v. City of Norfolk*, 816 F.2d 932 (4th Cir. 1987) and 883 F.2d 1232 (4th Cir. 1989). *Lewis*, *supra*, 99 F.3d at 615, n.12.

The panel majority also overlooks settled voting rights jurisprudence in criticizing both parties for examining the qualifications of candidates. This ruling for which no legal authority is cited is manifestly incorrect as it is directly contrary to the instruction in *Johnson v. De Grandy*, *supra*, that courts must consider the totality of circumstances before reaching a conclusion about vote dilution. The panel majority, moreover, completely overlooked numerous decisions

that have discounted the electoral defeats of weak, inexperienced or nonviable minority candidates that ran poor campaigns and therefore would give a false impression of the ability of minority voters to elect candidates of choice. *Rollins*, 89 F.3d at 1213, 1215; *Uno*, *supra*, 72 F.3d at 983, esp. nn. 4 and 5; *Aldasoro*, *supra*, 922 F. Supp. at 348-50, 374-75 (collecting cases); *Romero v. City of Pomona*, 665 F. Supp. 853, 861 (C.D. Cal. 1987 (poor campaign)), *aff'd*, *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989); *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1329, 1335-36 (C.D. Cal. 1990) (disregarding minor or marginal Hispanic preferred Hispanic candidates), *aff'd*, 918 F.2d 763 (9th Cir. 1990). The strong qualifications of the two successful minority candidates in 1994 compared to prior Hispanic candidates obviously are relevant to any determination of whether their successes were aberrational. *NAACP v. City of Niagara Falls*, *supra*, 65 F.3d at 1021 fn. 22 ("It borders on the absurd, of course, to suggest that an individual's success in politics should be discounted as aberrational because the person is qualified and popular"). Disregarding such evidence is plainly contrary to the totality of the circumstances inquiry.

The panel majority clearly overlooked material points of law and contrary decisions on an issue that as Judge Wallace, dissenting, notes, properly is part of the district court's ultimate vote dilution inquiry and unnecessary to decide now.

CONCLUSION

The City therefore urges that its Petition for Writ of Certiorari be granted to delete parts IV.B and IV.D from the Ninth Circuit opinion, from which J. Wallace dissented.

Respectfully submitted.

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APRIL 1999

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESPERANZA RUIZ; JOSEPH TALAUGON; ILTRA GARCIA; FRANCISCO DELGADO,

Plaintiffs-Appellants,

v.

CITY OF SANTA MARIA; CITY COUNCIL OF SANTA MARIA; BOB ORACH; JANET R. KALLAND, City Council Members, City Clerk; all sued in their official capacities; ROGER BUNCH; TORU MIYOSHI; JOSEPH CENTENO; ABEL MALDONADO,

Defendants-Appellees.

No. 96-56564

D.C. No.
CV-92-04879-JMI

OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
February 2, 1998 - Pasadena, California

Filed November 5, 1998

Before: J. Clifford Wallace, Stephen S. Trott and Michael Daly Hawkins, Circuit Judges.

Per Curiam Opinion; Partial Concurrence and Partial Dissent by Judge Wallace; Partial Concurrence and Partial Dissent by Judge Hawkins

PER CURIAM:[1]

Four Hispanic residents and registered voters of the City of Santa Maria challenge the City's at-large city council election system under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. While the case was pending, two Hispanic candidates were elected to the city council. The district court dismissed the complaint as moot and, alternatively, granted summary judgment in favor of the City. We hold that the district court erred in dismissing the case as moot and applied erroneous legal standards to the Plaintiffs' vote dilution claim and, therefore, we reverse.

I. FACTS

Santa Maria is a California general law city located in Santa Barbara County. Since its incorporation in 1905, it has employed an at-large system for electing its mayor and city council members. The mayor, who is also a member of the city council, is elected by a citywide plurality vote to serve a two-year term. Council members are elected by a citywide plurality vote for four-year terms. Their terms are staggered so that two council members are elected every other year. Each registered voter can vote for two candidates but is not prohibited from casting a single ballot ("single-shot" or "bullet" voting).

The City's 1990 population of 61,284 has doubled since 1970. According to the 1990 Census, 46.4% of the City's population is white, 45.7% is Hispanic, 1.9% is black, and 5.9% is Asian, Pacific Islander, or other.[2] The Hispanic population is growing: Hispanics were 27% of the City's population in 1970 and 33% in

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[1] Judge Trott joins in all of the Opinion. Judge Wallace joins in all but parts IV.B and IV.D. Judge Hawkins joins in all but part IV.A.2.

[2] We recognize that labels such as Hispanic, Hispano, Mexicano, Latino, white, Anglo, black, African-American, or Asian have different meanings to various groups. For purposes of simplicity and convenience, we attach no particular significance to any label and use broad terms such as "white," "Hispanic," and "black."

1980. The parties' experts agreed that Hispanic population, citizenship, and voter registration will continue to grow but disagreed at what rate. While Hispanics comprised nearly one-half of the City's population in 1990, they were only 28.7% of the voting age citizen population.

Prior to 1994, no Hispanic had ever been elected mayor or council member. Twelve Hispanics ran and lost in city council and mayoral elections from 1972-1992 -- all but two placed last. The parties' experts studied four city council elections (1988, 1990, 1992, and 1994) and the 1990 mayoral election in depth and provided detailed statistical reports.[3] These reports showed that while Hispanic candidates were the first or second preference[4] of Hispanic voters in each election, Hispanic candidates were the least-preferred among non-Hispanic voters and came in last every time, except in 1994.

In 1988, four candidates ran for city council. Tom Urbanske, the incumbent who was white, was Hispanic voters' first preference. A Hispanic candidate was Hispanics' second preference but came in last overall, receiving only 15.7% of the non-Hispanic vote. Urbanske and another white candidate were elected.

In 1990, the City's long-time mayor, George Hobbs, was under fire from the Hispanic community for complaining about a "Mexican problem" in Santa Maria.[5] He easily won the mayoral

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[3] One expert performed a "bivariate ecological regression analysis" and a "homogeneous precinct analysis" for all five elections. Another conducted an exit poll analysis for the 1990 city council and mayoral elections.

[4] In other words, the first-preferred candidate among Hispanics received the most Hispanic votes; the second-preferred candidate received the second most votes from Hispanic voters.

[5] " 'At this time in Santa Maria, we have a Mexican problem,' Hobbs claimed. 'We have a difficulty with scads of illegal aliens that have come across the border, and they've made our neighborhoods look not like Santa Maria neighborhoods. In certain streets, people (are) gathered around in groups drinking beer, smoking cigarettes. It's a formidable experience for a lot of the older people who have been here for a long time.' " Jeanne Sparks, *Hobbs: Illegal alien situation out of hand*,

election, receiving 71.4% of the non- Hispanic vote but only 13.3% of the Hispanic vote. Another white mayoral candidate withdrew from the race two months before the election because the community was so polarized along racial lines. Nevertheless, he finished second overall, receiving more non-Hispanics' votes than the two Hispanic candidates combined. The Hispanic candidates finished last and next-to-last, despite being Hispanic voters' first and second preferences.

The Hispanic candidate did not fare any better in the 1990 city council election. The Hispanic candidate was the first preference of Hispanic voters, receiving 66.2% of Hispanics' votes. Nonetheless, he received only 8.6% of the non-Hispanic vote and came in last out of five candidates. The two white incumbents, the first and second preferences of non-Hispanics while least- preferred by Hispanics, were re-elected.

In 1992, Urbanske, the white incumbent, was again Hispanic voters' first preference out of seven candidates. Hispanics' second preference, a Hispanic candidate, was least-preferred by non-Hispanic voters and came in last. Urbanske and Toru Miyoshi,[6] the third preference of Hispanics and non- Hispanics, were elected.

Plaintiffs filed this action in August 1992, seeking a declaration that the City's at-large election system impermissibly diluted the vote of Hispanics and an injunction creating a single-member district election system. Plaintiffs proposed a four- or five-district system in which Hispanics would comprise a majority of the voting age citizen population in one district. On the day before the July 1994 trial, the district court vacated the trial date because

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Santa Maria Times, July 17, 1990, at 5. Hobbs stated he was not referring to " 'our Santa Maria Mexicans that have been here forever.' " *Id.* Hobbs proposed that U.S. tax money " 'that's wasted up here in programs and welfare' " be used to build colonies in Mexico to " 'make it so good for them that they would be willing to stay there.' " *Id.*

[6] Interestingly, Miyoshi, an Asian candidate, campaigned on his "[c]ommitment to address the 'Mexican problem.' " He promised he would "address the problem with sensitivity and fairness."

Plaintiffs had submitted new trial exhibits which contained statistical information from the June 1994 statewide primary elections and the City had no time to prepare rebuttal evidence.[7] The district court continued the trial for an additional reason: "an informed ruling in this matter requires a review of the results produced by the upcoming Santa Maria election in November 1994."

In the 1994 election, two Hispanic candidates were elected to the city council. Joe Centeno, the city's former police chief, finished first, as the second preference of Hispanics and non-Hispanics. Abel Maldonado, a young local businessman, won the second seat, as the first preference of Hispanics and the third preference of non-Hispanics. Non-Hispanic voters' first preference, a white candidate, came in third. Thus, in 1994, Hispanic voters succeeded in electing their first and second preferences to the city council.[8]

In October 1995, the district court vacated the upcoming trial date and *sua sponte* issued an Order to Show Cause why the case should not be dismissed as moot. Plaintiffs argued that "special circumstances" surrounded the 1994 city council election, and thus the district court should ignore the results. Plaintiffs relied on four things to support their "special circumstances" argument:

(1) There was unprecedented crossover voting by non-Hispanics. From 1988-1992, non-Hispanic support for Hispanic city council candidates had declined, from 15.7% in 1988, to

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[7] At that time, the City's defense to Plaintiffs' vote dilution claim was Plaintiffs could not create a district in Santa Maria in which Hispanics comprised a majority of the voting age citizen population (dubbed the "*Thornburg* district"). Plaintiffs' new evidence showed that Hispanics were 59% of registered voters in the proposed *Thornburg* district in July 1994.

[8] Also, the Hispanic vote seems to have been a decisive factor in the defeat of George Hobbs for mayor in 1994. The record does not contain, however, a statistical report of the Hispanic and non-Hispanic voting percentages for that election.

8.6% in 1990, and to 4.7% in 1992.[9] Yet in 1994, 35.2% of non-Hispanics voted for Centeno, and 26.1% voted for Maldonado. It was the first election in which Hispanic candidates were not the least- preferred among non-Hispanic voters.

(2) The two Hispanic winners received endorsements from community organizations and politicians, including Mayor Hobbs, who had never before endorsed a Hispanic candidate.[10]

(3) The winning Hispanic candidates received unprecedented financial contributions from non-Hispanic individuals and businesses. Prior to 1994, no Hispanic candidate had received more than $790 from non-Hispanics. In 1994, Centeno received $4,550 and Maldonado received $6,625 from the non-Hispanic community. Also, Maldonado spent approximately $32,000 on his campaign--three times the highest amount ever spent on a council election.

(4) It was well-known throughout Santa Maria and by city council members that Plaintiffs had filed a vote dilution lawsuit and that the district court had continued the trial to evaluate the results of the 1994 election. Five days before that election, Maldonado stated in the *Santa Maria Times*, "If I get elected, it will show that the city of Santa Maria is not racist. Some parties in this lawsuit don't want to see a Hispanic on the City Council until after the suit is settled."[11]

In September 1996, the district court dismissed the case as moot under Fed. R. Civ. Proc. 12(b)(1), stating that the election of two Hispanics to the city council precluded the court from grant-

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[9] In the 1990 mayoral election, two Hispanic candidates received 6.6% and 5.1% of the non-Hispanic vote.

[10] Endorsements were received from: Curtis Tunnell, long-time city council member; Casey Kyle, former mayor; Harrell Fletcher, former county supervisor; The Committee to Improve North County, informal political action committee of the Santa Maria Chamber of Commerce; and Santa Maria Firefighters Political Action Committee.

[11] Tim Epperson, *Council Candidate gets Threatening Letter*, Santa Maria Times, November 3, 1994, at C.

ing effective relief to Plaintiffs. In the alternative, the court granted the City's Motion for Summary Judgment, finding that Plaintiffs could not prove that a majority voting bloc usually defeats the Hispanic-preferred candidate, a necessary precondition to establishing a claim of vote dilution.[12] This appeal followed.[13]

II. STANDARD OF REVIEW

We review de novo a district court's dismissal of an action on the ground of mootness and grant of summary judgment. *See Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1509 (9th Cir. 1994) (mootness); *Valladolid v. City of National City,* 976 F.2d 1293, 1295 (9th Cir. 1992) (summary judgment).

III. MOOTNESS

Article III of the Constitution limits federal courts to adjudicating actual, ongoing controversies between litigants. *See Deakins v. Mohaghan,* 484 U.S. 193, 199, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988). Generally, an action is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Lee v. Schmidt-Wenzel,* 766 F.2d 1387, 1389 (9th Cir. 1985) (internal quotations and citations omitted). "The basic question in determining mootness is whether there is a

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[12] Plaintiffs had moved for partial summary judgment, claiming that Hispanics were sufficiently large and geographically compact to constitute a majority of the voter-eligible population in a single-member district. The district court denied the motion, finding it was mooted by the 1994 election results.

[13] The City requests that we take judicial notice of the 1996 mayor and city council elections results, pursuant to Fed.R.Evid. 201(b)(2). In that election, Maldonado was elected mayor, and Miyoshi and a white candidate were elected to city council. We deny the request for two reasons. We may not rely on subsequent election results in reviewing the district court's judgment. *See Romero v. City of Pomona,* 883 F.2d 1418, 1420 n. 1 (9th Cir. 1989), *overruled in part on other grounds, Townsend v. Holman Consulting Corp.,* 914 F.2d 1136 (9th Cir. 1990) (en banc). Also, those election results do not tell us if any of the winning candidates were Hispanic-preferred, the relevant issue in this appeal.

present controversy as to which effective relief can be granted." *Northwest Environmental Defense Center v. Gordon,* 849 F.2d 1241, 1244 (9th Cir. 1988). Claims for injunctive relief become moot when the challenged activity ceases if "subsequent events have made it clear that the alleged violations could not reasonably be expected to recur." *Chinese for Affirmative Action v. Leguennec,* 580 F.2d 1006, 1009 (9th Cir. 1978).

The district court recognized that the effective relief Plaintiffs sought was a district election system but stated that the real reason for bringing the lawsuit was to elect Hispanic-preferred candidates. Because this result was achieved in the 1994 at-large election, the district court reasoned that a district system would not be more "effective." Therefore, the district court concluded it could not grant Plaintiffs any effective relief and declared the case moot.

Because the district court's mootness analysis misapprehends the essence of a vote dilution claim, we reverse. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 ("Section 2"), prohibits any standards, practices, or procedures that deny or abridge the right of citizens to vote on account of their race, color, or membership in a language minority group. *See Valladolid,* 976 F.2d at 1295. A Section 2 violation is any political process leading to an election that is not "equally open to participation" by a minority group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As amended in 1982, Section 2 "requires proof only of a discriminatory result, not of discriminatory intent." *Smith v. Salt River Project Agr. Imp. and Power Dist.,* 109 F.3d 586, 594 (9th Cir. 1997). Nevertheless, the Voting Rights Act does not establish a right of a minority group to elect its representatives in proportion to its population size. See 42 U.S.C. § 1973(b). Rather, the focus of Section 2 is "whether the political process is equally open to minority voters." *Thornburg v. Gingles,* 478 U.S. 30, 79, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). Thus, Section 2 guarantees a fair *process*, not an equal *result.*

There is a present, live controversy in this case--whether the City's at-large election system impermissibly dilutes the votes of Hispanics. The district court concluded that Hispanics have the ability to elect their preferred candidates in the at-large system; that was a determination of the merits. The results of the 1994

election are certainly a factor relevant to whether Hispanics have the ability to elect their preferred candidates in the current system. Those elections results, however, do not affect the *power* of the district court to grant an effective remedy.

This lawsuit would be moot if, for example, Plaintiffs had moved out of Santa Maria or the City had already adopted a district election system. *See Chinese for Affirmative Action*, 580 F.2d at 1009 (claim for injunctive relief requiring multilingual ballots in a particular election was moot after the election was held, but sufficiency of the city's current compliance with Voting Rights Act was a live controversy). But the presence of two Hispanics on the city council does not affect the power of the district court to grant effective relief if Hispanic votes are impermissibly diluted.

Moreover, the relevant inquiry in a vote dilution case is whether a majority bloc *usually* defeats the minority-preferred candidate, not whether a minority candidate is ever elected. In *Gingles*, 478 U.S. at 30, 106 S.Ct. 2752, the authoritative interpretation of a Section 2 claim, the Supreme Court stated that a district court may accord greater weight to minorities' lack of success over the course of several recent elections rather than to their success in one election. *See id.* at 76, 106 S.Ct. 2752.

> Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election.

Id. at 57, 106 S.Ct. 2752 (internal citation omitted). Rather than folding the 1994 election results into its analysis of the merits, the district court found those results dispositive as to its continuing jurisdiction. The 1994 election results, which plaintiffs allege "sporadically and serendipitously benefit[ed] minority voters," *id.* at 76, 106 S.Ct. 2752, did not terminate the present, live controversy in this case.

IV. *GINGLES* AND ITS THIRD PRONG

Gingles established a two-step inquiry for analyzing a vote dilution claim. In the first step, a minority group challenging an at-large election system must demonstrate that: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the Section 2 majority[14]] votes sufficiently as a bloc to enable it, in the absence of special circumstances, "usually to defeat the minority's preferred candidate." 478 U.S. at 50-51, 106 S.Ct. 2752. In the second step, the district court must decide, based on the "totality of the circumstances," whether the challenged practice impermissibly impairs the ability of the minority group to elect their preferred representatives. *Id.* at 44-45, 106 S.Ct. 2752. The Senate Judiciary Committee produced a list of non-exhaustive factors a court should consider in examining the totality of circumstances.[15]

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[14] *Gingles* reference to a "white majority" voting bloc must be read in the context of the facts presented to the Court. Because Section 2 protects both racial and language minorities, we will refer to the relevant majority voting bloc as the "Section 2 majority."

[15] The so-called "Senate factors" are:

(1) the extent of any history of official discrimination in the state or political subdivision affecting the right of a member of a minority group to register, vote, or participate in the democratic process; (2) the extent to which voting in government elections is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group (for example, unusually large election districts, majority vote requirements, prohibitions against bullet voting); (4) exclusion of minorities from a candidate slating process; (5) the extent to which minority group members in the state or political subdivision bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which minorities have been elected to public office in the jurisdiction; (8) the extent to which elected officials are unresponsive to the particularized needs of minorities; and (9) the policy reason for the jurisdiction's use of the challenged practice. *See* S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07.

The key issue before us is the third *Gingles* precondition. The district court granted summary judgment for Santa Maria, in the alternative, because it found that Plaintiffs could not prove the third *Gingles* prong. Because four Hispanic-preferred candidates were elected in the last four city council elections (a success rate of 50%), the district court concluded that a white majority voting bloc did not usually defeat the Hispanic-preferred candidate. The district court also relied on the projected growth of the Hispanic population in Santa Maria and the availability of single-shot voting to support its conclusion.

Plaintiffs argue that: (1) the election of a Hispanic-preferred white candidate is not as probative as the defeat of a Hispanic-preferred Hispanic candidate; (2) the use of single-shot voting and the changing demographics of Santa Maria are irrelevant to a *Gingles* prong three analysis; and (3) special circumstances surrounded the 1994 election. We agree.

A. Who is the "minority's preferred candidate"?

1.

The Supreme Court has not defined the term "minority's preferred candidate." *See Gingles,* 478 U.S. at 51, 106 S.Ct. 2752. *Gingles* created confusion on this issue because the Supreme Court split on the relevance of the candidate's race in finding racially polarized voting. Racially polarized voting, one of the most important Senate factors, is the combined effect of the second and third *Gingles* preconditions (minority political cohesion and majority bloc voting). *See id.* at 56, 106 S.Ct. 2752; *Romero,* 883 F.2d at 1423. Justice Brennan, writing for a plurality, defined racially polarized voting as a correlation between the race of the voters and the selection of candidates. *See Gingles,* 478 U.S. at 74, 106 S.Ct. 2752. He rejected other factors such as the race of the candidates or voters' racial animosity toward minority candidates as primary determinants of voter behavior. *See id.* at 67-72,

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Factors two and seven are the most important. *See Gingles,* 478 U.S. at 48 n. 15, 106 S.Ct. 2752.

106 S.Ct. 2752. Although he noted that minority and majority voters often select members of their own race as their preferred representatives, Section 2 was concerned with "the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate." *Id.* at 68, 106 S.Ct. 2752 (emphasis in original).

Five Justices did not agree. Justice O'Connor wrote for a plurality and Justice White wrote separately to state that the race of the candidate could be relevant in a vote dilution inquiry. *See id.* at 100-01, 106 S.Ct. 2752 (O'Connor, J.); *id.* at 83, 106 S.Ct. 2752 (White, J.). Their position was based, however, on concern that ignoring the race of the candidate as well as other evidence concerning voting preferences would overlook the relevance of partisan affiliation in determining voter behavior.

Although helpful, these various arguments do not address the issue before us: whether a "minority's preferred candidate" may be a non-minority. We only briefly mentioned the issue in *Valladolid,* where we stated that plaintiffs "too easily equate the presence or absence of minority individuals on the council with the victory or defeat of minority-preferred candidates." 976 F.2d at 1297; *but see Gomez v. City of Watsonville,* 863 F.2d 1407, 1416-17 (9th Cir. 1988) (discussing the success rate of "Hispanic candidates" in the third *Gingles* prong analysis).

Most circuits have rejected Justice Brennan's position on the lack of importance of a candidate's race[16] and hold that a minority preferred candidate may be a non-minority. *See Lewis v. Alamance County,* 99 F.3d 600, 607 (4th Cir. 1996), *cert. denied,* — U.S. —, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997); *Sanchez v. State of Colorado,* 97 F.3d 1303, 1320 (10th Cir. 1996), *cert. denied,* — U.S. —, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997); *Uno v. City of Holyoke,* 72 F.3d 973, 988 n. 8 (1st Cir. 1995); *NAACP v. City of Niagara Falls, N.Y.,* 65 F.3d 1002, 1016 (2d Cir. 1995) ("Niagara Falls "); *Clarke v. City of Cincinnati,* 40 F.3d 807, 812

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[16] In fairness to Justice Brennan, he did not suggest that only minority candidates could be considered minority-preferred. Rather, his discussion of the irrelevance of a candidate's race was in the context of defining racial polarization.

(6th Cir. 1994); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc); *Jenkins v. Red Clay Consol. Sch. Dist.*, 4 F.3d 1103, 1125 (3d Cir. 1993); *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) ("LULAC "). Conversely, a candidate is not minority- preferred simply because the candidate is a member of the minority. *See Lewis*, 99 F.3d at 607; *Harvell v. Blytheville School Dist.* # 5, 71 F.3d 1382, 1386 (8th Cir. 1995); *Jenkins*, 4 F.3d at 1125.

We join our sister circuits in rejecting the position that the "minority's preferred candidate" must be a member of the racial minority. To hold otherwise would, in the words of Judge Cabranes, provide judicial approval to "electoral apartheid." *See Niagara Falls*, 65 F.3d at 1016. "Such an approach would project a bleak, if not hopeless, view of our society -- a view inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy." *Id.* The minority community may prefer a white candidate just as the white community may prefer a minority candidate. *See Lewis*, 99 F.3d at 607.

2.

We must next determine which candidate in a given election is a minority- preferred candidate. Although this is an issue of first impression in the Ninth Circuit, other Circuits have reached the issue, resulting generally in two very different approaches.

The Second, Fourth, and Sixth Circuits use an objective test that considers which candidate receives the most votes from minority voters. *See id.* at 614; *Niagara Falls*, 65 F.3d at 1018-19; *Clarke*, 40 F.3d at 810 n. 1.

The Third, Eighth, Tenth, and Eleventh Circuits, on the other hand, use variations on a totality of the circumstances theory and require district courts to conduct election specific analyses of anecdotal evidence such as whether minorities mobilized to support the candidate. *See Sanchez*, 97 F.3d at 1321; *Harvell*, 71 F.3d at 1386; *Nipper*, 39 F.3d at 1540; *Jenkins*, 4 F.3d at 1129.

We agree with the Second Circuit that a bright-line rule is the better test. The other approach of "evaluating whether a person is, 'as a realistic matter,' minority-preferred--based on subjective indicators such as 'anecdotal testimonial evidence'--is a dubious judicial task, and one that can degenerate into racial stereotyping of

a high order." *Niagara Falls*, 65 F.3d at 1018. In addition, many of the extrinsic factors relied upon by the courts adopting the totality of the circumstances analysis do not necessarily bear a correlation with how all minority voters feel about a candidate, only how activist groups feel. Whether minority voters mobilized to support a white candidate, a factor considered relevant by the Third Circuit, *Jenkins*, 4 F.3d at 1129, only indicates how those minorities willing to become politically active feel about a candidate; not all minorities may have the time or inclination to take such steps, even though they support that candidate. A bright-line rule, on the other hand, is based on the premise "that the ballot box provides the best and most objective proxy for determining who constitutes a representative of choice." *Niagara Falls*, 65 F.3d at 1019.

In our view, however, the requirement imposed by the Second Circuit that a candidate receive 50 percent or more of the votes cast by a minority group to qualify as minority-preferred can be too restrictive, particularly in a city such as Santa Maria, where all candidates routinely receive fewer than 50 percent of the Hispanic vote. *See* Appendix. Therefore, we hold that a candidate who receives sufficient votes to be elected if the election were held only among the minority group in question qualifies as minority-preferred. *See Lewis*, 99 F.3d at 614. We also agree with the Second Circuit that "a court need not treat the candidate as minority-preferred when another candidate receiving greater support in the primary failed to reach the general election." *Niagara Falls*, 65 F.3d at 1019.

B. Evidentiary weight of election of minority-preferred majority candidate

Plaintiffs do not argue that the district court erred in considering the elections of Urbanske in its third *Gingles* prong analysis. Rather, they contend the district court should have placed less evidentiary weight on Hispanic voters' ability to elect Urbanske, a white candidate, than on their inability to elect a Hispanic candidate.

Few courts have addressed this issue. Our sister circuits have grappled with the question of whether, in a *Gingles* prong three analysis, an election involving only non-minority candidates is relevant and, if so, whether it should receive equal evidentiary

weight as an election in which there is a contest between a minority and non-minority candidate. Most courts hold that a fully non-minority election may be relevant and is admissible to determine whether there is a voting bloc of sufficient power that usually defeats a minority's preferred candidate. An election pitting a minority against a non- minority, however, is considered more probative and accorded more weight. *See Lewis*, 99 F.3d at 608, 610 n. 8 (assuming that white-white elections are entitled to less weight); *Uno*, 72 F.3d at 988 n. 8; *Niagara Falls*, 65 F.3d at 1017; *Nipper*, 39 F.3d at 1540; *Jenkins*, 4 F.3d at 1128; *LULAC*, 999 F.2d at 864.

The general reasoning behind this conclusion is that non-minority elections do not provide minority voters with the choice of a minority candidate and thus do not fully demonstrate the degree of racially polarized voting in the community.

> [T]he most probative evidence of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections involving [minority] candidates. Certainly, where only white candidates are competing for office in a particular jurisdiction, it is virtually unavoidable that certain white candidates would be supported by a large percentage of ... [minority] voters. Such elections, however, may reveal little about the issue to be determined: the capacity for white bloc voting usually to defeat [minority] candidates of choice. Particularly where voting is extremely polarized by race in elections in which [minority] candidates participate, white-on-white elections in which a small majority (or a plurality) of [minority] voters prefer the winning candidate seem comparatively less important.

Nipper, 39 F.3d at 1540 (internal quotations and citation omitted).

The reasoning behind this rule provides persuasive guidance on the issue before us. For just as a minority vs. non-minority election is more probative of racially polarized voting than a non-minority vs. non-minority election, the inability of Hispanic voters to elect a Hispanic candidate is more probative in a *Gingles*

prong three analysis than the ability of Hispanic voters to elect a non-minority candidate.

The Sixth Circuit alone has addressed this issue. In *Clarke*, the court held that the district court should have examined whether white bloc voting was targeted against black candidates (electoral success rate of 47%), not just against black-preferred white candidates (electoral success rate of 74%). *See* 40 F.3d at 812. The court reasoned:

> When white bloc voting is "targeted" against [minority] candidates, [minority] voters are denied an opportunity enjoyed by white voters, namely the opportunity to elect a candidate of their own race. If [minority] voters nevertheless are able to elect many or most of their preferred candidates who are white, a court that refuses to consider candidate race will be unable to conclude that the white majority votes sufficiently as a bloc to enable it ... *usually* to defeat the minority's preferred candidate.... But the Act's guarantee of equal opportunity is not met when, in the words of Judge Richard Arnold, "[c]andidates favored by [minorities] can win, but only if the candidates are white."

Id. (some internal quotations and citations omitted) (quoting *Smith v. Clinton*, 687 F.Supp. 1310, 1318 (E.D.Ark.) (three-judge panel), *aff'd*, 488 U.S. 988, 109 S.Ct. 548, 102 L.Ed.2d 576 (1988)); *but see Lewis*, 99 F.3d at 610 n. 8 (opining that candidate's race was relevant only in determining whether racial polarization exists, not whether minority-preferred candidates were usually defeated).[17]

The *Clarke* court relied on *Jenkins*, 4 F.3d 1103, and *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), for support. *See Clarke*, 40 F.3d at 812. In *Jenkins*, the court observed that "if the minority community would prefer a minority candidate or believes that a minority candidate would best

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[17] The *Clarke* court ultimately concluded that the third *Gingles* prong was not met because black candidates were not "usually" defeated. *See Clarke*, 40 F.3d at 813.

represent its interests, then § 2 establishes a right on the part of those citizens for their preferred minority candidate to have an equal opportunity to be elected." 4 F.3d at 1128 n. 22. *Gretna* addressed a situation nearly identical to ours:

> In a multiple seat election such as Gretna's aldermanic race, the minority necessarily will have more than one preferred candidate. In the Gretna elections studied, blacks exercised their right to vote to fill all at- large positions, but only one available candidate was black. Thus, it was virtually unavoidable that certain white candidates would be supported by a large percentage of Gretna's black voters. Significance lies in the fact that the black candidate preferred by the minority was defeated by white bloc voting. That blacks also support white candidates acceptable to the majority does not negate instances in which white votes defeat a black preference.

834 F.2d at 502.

We believe this reasoning is persuasive and hold that, in a multi-seat, multi-vote election, the ability of the minority to elect a non-minority candidate is not as probative in a *Gingles* prong three analysis as the inability of the minority to elect a minority candidate. To hold otherwise would doom any Section 2 claim in which white candidates, acceptable to minorities and non-minorities alike, are regularly elected but in which minority candidates, preferred by minorities but unfavored by whites, are consistently defeated. Our rule furthers the Voting Rights Act's goal of protecting the minority's equal opportunity to "elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). The Act means more than securing minority voters' opportunity to elect whites.[18]

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[18] Our rule does not contravene the Voting Rights Act's prohibition against proportional minority representation. See 42 U.S.C. § 1973(b). The election of minority-preferred white candidates is relevant to determining the degree of racially polarized voting in a community. We recognize "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever

The district court erred in applying a simple mathematical approach -- counting the number of successful Hispanic-preferred candidates divided by the number of elections -- in its *Gingles* prong three analysis. This mechanical approach failed to fulfill the district court's duty to make "a searching practical evaluation of the past and present reality" with "a functional view of the political process." *Gingles,* 478 U.S. at 45, 106 S.Ct. 2752 (internal quotations omitted) (citing S.Rep. No. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208). The reality facing Hispanic voters in Santa Maria in the 1988, 1990, and 1992 elections was a choice of one Hispanic candidate and several non-Hispanic candidates for two council seats. In those elections, Hispanic voters preferred the lone Hispanic candidate and, unavoidably, one of the remaining non-Hispanic candidates. The Hispanic candidate came in last while Urbanske, a Hispanic-preferred candidate, won in 1988 and 1992. *See Gingles*, 478 U.S. at 60-61, 106 S.Ct. 2752 (district court properly considered "the very different order of preference blacks and whites assigned black candidates"). The success of a Hispanic-preferred candidate like Urbanske does not necessarily demonstrate that Hispanics have an equal opportunity to participate in Santa Maria city council elections. Rather, it may simply show that, at least historically, Hispanics have been relegated to casting a veto between majority-preferred white candidates.

On remand, the district court should consider the elections of Urbanske in 1988 and 1992 in determining whether racial bloc voting exists in Santa Maria. The defeat of Hispanic-preferred Hispanic candidates, however, is more probative of racially polarized voting and is entitled to more evidentiary weight. The district court should also consider the order of preference non- Hispanics and Hispanics assigned Hispanic-preferred Hispanic candidates as well as the order of overall finish of these candidates. Only then

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race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n. 11, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). When non-minority voters may elect their chosen representatives who are non-minorities, but minority voters cannot elect their chosen minority representatives, equal opportunity to elect is not achieved.

can the district court determine whether a Section 2 majority bloc voting usually defeats Hispanic voters' candidates of choice.

C. The relevance of other factors to Gingles' third precondition

The district court also considered the use of single-shot voting and the growth of the Hispanic community in Santa Maria in its grant of summary judgment for the City on Gingles prong three. That consideration is misplaced.

Under the City's present at-large election system, a Hispanic voter may vote for one or two candidates in a multi-seat election; the district court agreed with the City that this system "provides the greatest opportunity" for Hispanics to elect a preferred candidate. While we question the factual accuracy of this statement,[19] we hold that the mere ability to bullet vote does not eliminate a triable issue regarding whether minority- preferred candidates are usually defeated.

The ability of minority voters to bullet vote does not remedy a vote dilution injury. When a court finds an inference of vote dilution because the plaintiffs proved the three *Gingles* preconditions, the court may consider the presence of an "anti-single-shot" provision in its "totality of the circumstances" inquiry. *See Gingles*, 478 U.S. at 37, 106 S.Ct. 2752 (quoting Senate Report factor three). Although we have recognized that bullet voting concentrates minority voting power on select candidates and withholds minority votes from majority candidates, *see Badillo v. City of Stockton*, 956 F.2d 884, 890 (9th Cir. 1992), we have never stated

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[19] As of 1994, Hispanics comprised only 28.7% of the voting age citizen population in Santa Maria. Even if all Hispanic eligible voters voted for the same Hispanic candidate, those total votes could conceivably not be enough to ensure election. *See Sanchez*, 97 F.3d at 1319 (*Gingles* does not require an absolute monolith in the white or Hispanic bloc vote). The 1990 city council election is illustrative. The Hispanic candidate received 66.2% of the Hispanic vote but finished last in a field of five. Only a combined total of 21.5% of Hispanics voted for the two winning white candidates. Each of the third- and fourth-place candidates received more Hispanic votes than the two winners. Obviously, bullet-voting would not have been effective.

that vote dilution is solved by the absence of an anti-single-shot provision. Indeed, no court has affirmatively required minority voters to bullet vote to elect their preferred candidates.

Whatever relevance the existence of an "anti-single-shot" provision has in a "totality of the circumstances" inquiry, it is simply insufficient to sustain summary judgment on *Gingles* prong three for the City.[20]

The district court also erred in including the growing Hispanic population in its *Gingles* prong three analysis. First, the third *Gingles* prong asks a predominantly historical question – that is, whether the Section 2 majority bloc usually defeats the minority's preferred candidates. *See Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. This question is answered by evaluating past election results. Neither the growth of the minority community during these past elections nor its projected growth is relevant to finding racially polarized voting in a jurisdiction. Dramatically changing demographics become relevant only when the court finds the three *Gingles* preconditions met and considers the totality of the circumstances.

Second, a finding of vote dilution "depends upon a searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 45, 106 S.Ct. 2752 (internal quotations omitted). Nevertheless, "[t]he ultimate question in any section 2 case must be posed in the present tense, not the past tense." *Uno*, 72 F.3d at 990. Past elections may be less probative of vote dilution than more recent elections. *See id.; see also Aldasoro v. Kennerson*, 922 F.Supp. 339, 373 (S.D.Cal. 1995) (Hispanics presently have the ability to elect at-large). At the same time, the court must decide whether the current system actually dilutes the minority vote, not whether it may potentially aid minority voters. *See Jenkins*, 4

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[20] The City argues that bullet-voting bestows as much voting power to Plaintiffs in an at-large system as in a district system because, under a district system, Plaintiffs would be entitled to cast only one vote every four years. By bullet voting under the current system, Plaintiffs may cast one vote every two years. Plaintiffs' claim is not concerned with the number of votes cast. Rather, Plaintiffs' claim focuses on the equal voting of all Santa Maria voters. A district system would require all voters to cast an equal number of ballots in the same period.

F.3d at 1123. A court may not refuse to fashion a remedy after a claim of vote dilution is established based simply on its belief that the vote dilution injury will be solved in the future by changing demographics.

On remand, if the district court finds the three *Gingles* preconditions met and engages in a "totality of the circumstances" analysis, the proper inquiry is whether changing demographics demonstrate that Hispanics presently have the ability to elect at-large, not whether they will have this ability in the future.

D. The "special circumstances" doctrine

Plaintiffs argue that the success of two Hispanic candidates in 1994 was attributable to special circumstances and therefore should have been discounted or ignored by the district court in its *Gingles* prong three analysis. The district court found that Plaintiffs failed to submit any evidence that non-Hispanics voted for, endorsed, or financially supported the Hispanic candidates in an effort to defeat the lawsuit, and thus the special circumstances doctrine did not apply. Plaintiffs concede that they have no direct evidence of a conspiratorial intent by whites to elect Hispanic candidates to thwart the lawsuit.[21]

The "special circumstances" doctrine was enunciated in *Gingles,* where the Court stated that minority success in elections infected by special circumstances should not be counted or emphasized in a prong three analysis. 478 U.S. at 51, 106 S.Ct. 2752. This is because isolated minority success is distinct from the "usual predictability" of majority success present in a vote dilution claim. *Id.* Examples of special circumstances are: the absence of an opponent; incumbency; utilization of bullet voting; or the pendency of the instant lawsuit. *See id.* at 57, 106 S.Ct. 2752. When those circumstances are present, voters may behave differently than they would otherwise -- as such, that election is not probative of whether a Section 2 majority voting bloc *usually* defeats the minority's preferred candidate.

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[21] Plaintiffs deposed most of the principal politicians or local leaders who endorsed or campaigned for Centeno and Maldonado. All professed reasons for their actions unrelated to the plaintiffs' pending lawsuit.

The *Gingles* Court devoted the greatest attention to the special circumstance of minority success in an election during the pendency of litigation challenging the existing system. In such a situation, the district court "could properly consider to what extent the pendency of this very litigation [might have] worked a one-time advantage for [minority] candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting." *Id.* at 76, 106 S.Ct. 2752 (internal quotations and citation omitted). A plain reading of *Gingles*, however, does not compel the conclusion that plaintiffs must submit evidence that white leaders manipulated an election with the intent to thwart a vote dilution lawsuit. The Court stated that a district court should cautiously view minority electoral success achieved after a vote dilution lawsuit is filed. *See id.* The Court then stated several reasons why these minority successes might be unrepresentative of usual voting patterns: white politicians "might" apprehend that the election of a minority candidate would be politically expedient or "might" believe that the election of a minority candidate would thwart the lawsuit. *Id.* at 76 n. 37, 106 S.Ct. 2752 (quoting *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973)). The Court did not hold that, to invoke the special circumstances doctrine, plaintiffs *must* prove that white politicians are motivated by an intent to thwart the lawsuit or other racist reasons.

Nevertheless, several courts seem to have interpreted *Gingles* that way. In *Valladolid,* we found that plaintiffs' special circumstances argument failed because plaintiffs had submitted no other election results in support of the third *Gingles* requirement. 976 F.2d at 1297-98. We noted, in dictum, that the special circumstances doctrine did not apply because plaintiffs had "adduce[d] no evidence that the pendency of litigation in 1988 led to unusual support for minority-preferred candidates by whites seeking to maintain the at-large system." *Id.* at 1298; *see also Aldasoro*, 922 F.Supp. at 376 (no evidence that Hispanic candidate won because of unusual, organized white support or endorsement or because whites wanted to secure the dismissal of the lawsuit). The Second Circuit rejected plaintiffs' attempt to portray a minority candidate's election -- due to the candidate's outstanding credentials and popularity -- as surrounded by special circumstances. *See Niagara Falls*, 65 F.3d at 1021 n. 22. The court found this argument "absurd" and noted the absence of evidence indicating an attempt

by white voters to thwart the pending lawsuit. *See id.* at 1021. Recently, the Eleventh Circuit concluded that individual decisions to appoint minorities to the city commission or Board of Education were not attempts "to avoid the reach of the Voting Rights Act or to manipulate the instant case in any way." *Askew v. City of Rome*, 127 F.3d 1355, 1382 (11th Cir. 1997). The court emphasized, however, that voting behavior, not racist voting motivation, was the central inquiry in a Section 2 case. *See id.*

The Fourth Circuit has directly ruled on this issue. "[T]he absence of a conspiracy or an intent to moot this litigation does not end the district court's inquiry. The court should probe further to determine whether the [minority] candidate's success ... while this action was pending, resulted from unusual circumstances." *Collins v. City of Norfolk*, 816 F.2d 932, 938 (4th Cir. 1987).[22] In *Collins*, two black city council members were elected for the first time in city history. The mayor had, for the first time, supported a second black candidate and had publicly stated that the election might moot the issue of black representation. See id. The court held that the proper focus was the voting patterns that resulted from the mayor's conduct and statement, not the mayor's intent or a conspiracy by whites. *See id.* Thus, the Fourth Circuit requires proof of unusual circumstances, such as unusual white support for a minority candidate, not that the unusual circumstances resulted from an intent to thwart the lawsuit.

We are convinced this approach is sound and consistent with the overall purpose of the Voting Rights Act. An intent requirement has been rejected in other contexts of the Act. In *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), the Supreme Court departed from its prior cases and held that plaintiffs must prove purposeful discrimination in a vote dilution claim under the Act. *See id.* at 66-67, 100 S.Ct. 1490. Congress

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[22] Contrary to the City's argument, *Collins* has not been implicitly overruled. In *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989) ("Collins II"), the court affirmed the district court's finding that the recent re-election of black candidates was attributable to special circumstances. *See id.* at 1243. *Lewis* affirmed *Collins II's* central holding regarding the inquiry to be undertaken to determine who is the minority-preferred candidate but declined to extend it. *Lewis*, 99 F.3d at 612, 614.

swiftly amended Section 2 with the express purpose of repudiating the "intent test" because it was "unnecessarily divisive [in that] it involve[d] charges of racism on the part of individual officials or entire communities," it placed an "inordinately difficult burden of proof on plaintiffs," and it asked "the wrong question." *Gingles*, 478 U.S. at 44, 106 S.Ct. 2752 (internal quotations omitted) (quoting S. Rep. at 36, 1982 U.S.C.C.A.N. at 214). Instead, the "results test" asks the right question -- whether minorities have equal opportunity to participate in the political processes or to elect their chosen candidates as a result of a challenged practice or structure. *See id.* (quoting S. Rep. at 28, 1982 U.S.C.C.A.N. at 206).

Also, we rejected an "intentional discrimination" standard of proof when a district court considers the first Senate factor--the history of official discrimination in a state or political subdivision. *See Gomez*, 863 F.2d at 1418. We noted that Congress amended Section 2 to relieve plaintiffs of the burden of proving such intent. Although intentional discrimination may be relevant to a vote dilution claim, we held that plaintiffs need only focus on the results of official discrimination. *See id.* Thus, it seems clear that requiring proof of intentional discrimination or racist motives in any part of a vote dilution claim "diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives." S. Rep. at 18, 1982 U.S.C.C.A.N. at 177.

We hold that proof of groupwide or individual discriminatory motives has no part in a vote dilution claim. To invoke the special circumstances doctrine regarding an election that occurred after a Section 2 lawsuit is filed, plaintiffs must show that a particular election was surrounded by unusual circumstances. Those unusual circumstances must demonstrate that the election was not representative of the typical way in which the electoral process functions. The focus is voter behavior, not voter motivation.

This rule parallels the policies set forth in *Gingles* for rejecting the "intent test." First, it removes the requirement that plaintiffs not only brand but prove that white voters, organizations, or leaders are racists or motivated by racist ambitions. "Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community"--a result clearly antithetical to the purpose of a statute meant to engender racial harmony. *Gingles*,

478 U.S. at 72, 106 S.Ct. 2752 (internal quotation omitted) (quoting S. Rep. at 36, 1982 U.S.C.C.A.N. at 214 (testimony of Dr. Arthur S. Flemming, Chairman of U.S. Comm'n on Civil Rights)). Second, it eliminates an inordinately difficult burden of proof from plaintiffs. As this case demonstrates, it is virtually impossible to find evidence that white politicians or community groups conspired to manipulate an election to ensure the victory of a minority candidate. Rarely would these individuals admit to such a motive. We cannot even begin to imagine how plaintiffs could prove that thousands of individual voters cast their ballots intending to thwart the lawsuit. A thousand voters may vote for a particular candidate for a thousand different reasons; a discriminatory motive may only be a subconscious thought of the voter. Third, our rule asks the right question--whether a particular election was surrounded by unusual circumstances such that its results are not reliable indicators of typical voting behavior. Only minority electoral success in typical elections is relevant to whether a Section 2 majority voting bloc usually defeats the minority's preferred candidate.

Finally, our rule avoids an argument implicit in proof of intent to thwart a pending lawsuit--that somehow the victorious minority candidate was unqualified and elected only because of white manipulation. We strenuously reject any invitation to disparage the credentials of any candidate running for public office.[23] That is what happened in this case, in which the City argued in its brief that the Hispanic candidates who lost before 1994 "were weak candidates who would have lost even if they were white."[24] It would be a disservice to both the individual candidates and the goals of the Voting Rights Act for federal courts, years after an election, to scrutinize the qualifications of minority candidates who run for public office in jurisdictions with historically

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[23] *See, e.g., Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (minority electoral success after pending litigation "could lead white voters to throw the minority a bone").

[24] Plaintiffs made similar arguments by labeling Maldonado as unqualified.

white-only officeholders. Arguments regarding a candidate's qualifications for office are saved for the voters in an election. We reject any rule that would require the parties to cast aspersions on the qualifications of the victorious or defeated minority candidates.

Here, Plaintiffs submitted evidence that several aspects of the 1994 city council election were unprecedented: the percentages of non-Hispanic crossover voting for two Hispanic candidates; the endorsements of several white politicians and predominantly-white organizations for those candidates; the amount of financial support contributed by non-Hispanic businesses and individuals to those campaigns; and the amount that Maldonado spent on his campaign. It was well-known throughout Santa Maria that the district court was awaiting the results of that election. Days before the election, Maldonado told a local newspaper that his victory would prove "Santa Maria is not racist." Plaintiffs have raised a triable issue of fact in whether the 1994 city council election was representative of typical voting behavior in Santa Maria. At trial, if Plaintiffs prove that unusual circumstances surrounded that election, the district court must discount the election results in its *Gingles* prong three analysis.

V. STRICT SCRUTINY

Finally, the district court based its grant of summary judgment for the City on its determination that any relief provided to Plaintiffs would not survive strict scrutiny. If the district court determines that Santa Maria's at-large election system impermissibly dilutes the Hispanic vote, it may order the creation of a district system. The creation of new districts must be reasonably compact, "taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries...." *Bush v. Vera*, 517 U.S. 952, 977, 116 S.Ct. 1941, 1960, 135 L.Ed.2d 248 (1996). As the Supreme Court recently emphasized, strict scrutiny applies if race is the predominant motive in redrawing district lines. *See Abrams v. Johnson*, 521 U.S. 74, —, 117 S.Ct. 1925, 1936, 138 L.Ed.2d 285 (1997). The Court has assumed that compliance with Section 2 can be a compelling state interest. *See Bush*, at 978, 116 S.Ct. at 1960- 61; *Miller v. Johnson*, 515 U.S. 900, 921, 115 S.Ct. 2475, 2490-91, 132 L.Ed.2d 762 (1995).

The district court's consideration of the scrutiny required for a possible future remedy was premature. Before the court concerns itself with strict scrutiny, it first must find that Plaintiffs have proved the three *Gingles* preconditions, that the totality of the circumstances shows that the Hispanic vote is diluted, that a district system would remedy the injury, and that race is the predominant factor in drawing district lines. Raising the strict scrutiny issue in its analysis of the third *Gingles* requirement was erroneous.

VI. CONCLUSION

Accordingly, we reverse the dismissal of the case as moot, the grant of summary judgment for the City on the third *Gingles* precondition, and the denial of summary judgment for Plaintiffs on the first *Gingles* precondition. We take no position as to whether Plaintiffs may establish any of the three *Gingles* requirements. Plaintiffs, of course, are not required to *prove* any of the three preconditions in opposing a motion for summary judgment; they need only show a genuine dispute of material fact. The district court must consider a motion for summary judgment or the merits at trial under the legal rules established here.

REVERSED AND REMANDED.

APPENDIX

Estimated Percentages of Votes Cast
by Non-Hispanic and Hispanic Voters
in Santa Maria Elections

H-Hispanic Candidate

E-Elected

Overall finish	*Non-Hispanic*	*Hispanic*
	1988 City Council Election	
Urbanske (E)	61.4	49.5
Firth (E)	46.7	4.2
Snyder	34.6	27.4
Martel (H)	15.7	45.6
	1990 Mayoral Election	
Hobbs (E)	71.4	13.3
Rodenberger	16.9	15.8
Lopez (H)	6.6	42.6
Castillo (H)	5.1	28.3
	1990 City Council Election	
Tunnell (E)	49.0	12.8
Orach (E)	48.4	8.7
Engel	27.2	23.1
Droegemeier	26.3	20.5
Guevara (H)	8.6	66.2
	1992 City Council Election	
Urbanske (E)	50.4	38.4
Miyoshi (E)	35.5	31.5
Firth	36.4	-4.7
Varni	28.3	12.8
Anderson	12.1	22.1
Jerger	13.3	-1.1
Castillo (H)	4.7	35.9

1994 City Council Election

Centeno (E) (H)	35.2	39.8
Maldonado (E) (H)	26.1	65.4
Orach	42.2	1.1
Benedetti	24.2	4.0
Minami	9.4	22.3
Chenoweth	11.4	-1.6
Guevara (H)	1.9	31.6
Hollister	10.4	-1.2
Hosepian	5.5	3.1
Walker	3.2	10.6
Hunt	3.6	2.8
Watson	1.9	4.2

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I join the majority opinion except as to parts IV.B. and IV.D., to which I respectfully dissent.

I

In part IV.B., the majority holds that "[t]he defeat of Hispanic-preferred Hispanic candidates ... is more probative of racially polarized voting and is entitled to more evidentiary weight" than is the election of Hispanic-preferred non-Hispanic candidates. Maj. Op. at 554. The majority has argued logically for its position -- and it is not without weight. On balance, however, I cannot accept the majority's analysis.

What the majority has done is to dictate to the district court the weight that is to be given to different and perhaps contradictory pieces of evidence. Yet, the weight to be assigned to evidence is strictly within the province of the trier of fact, not the court of appeals. *See, e.g., Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844, 856-58, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982); *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 622 (9th Cir. 1993).

By usurping this role, the majority forecloses the possibility that the district court, after considering the evidence submitted in the case and the credibility and demeanor of testifying witnesses, may find that, in the circumstances of this case, the defeat of minority-preferred candidates is not as probative as the election of minority-preferred non-minority candidates.

The problem with an appellate court dictating the relative weight to be accorded to evidence is aptly illustrated by the majority's holding. What does it mean that one electoral result is to be given "more" weight than another? Is the defeat of one minority-preferred minority candidate equal in evidentiary weight to the election of two minority-preferred non-minority candidates? Or three? The majority cannot answer this question in anything more than an arbitrary fashion, precisely because the assigning of weight to evidence is properly left to the trier of fact.

Even if it were appropriate to dictate the weight to be placed on the evidence, I am still not persuaded that the majority's approach is correct. I would determine the level of polarization by considering the success or failure of minority-preferred candidates – regardless of race – who are not preferred by the majority. Thus, if the minority prefers candidate X and the majority does not, the defeat of candidate X would be probative of polarization regardless of his or her race.

Under the majority's approach, on the other hand, the weight to be accorded to the defeat of candidate X depends on candidate X's race. There is considerable tension between part IV.B. and our holding in part IV.A.1. that the race of the candidate is irrelevant to determining who is the minority- preferred candidate. We are in agreement that "[t]he minority community may prefer a white candidate just as the white community may prefer a minority candidate." Maj. Op. at [13a]. Yet, the majority implicitly holds in part IV.B. that a minority-preferred minority candidate is *more* preferred than a minority- preferred non-minority candidate, merely because of his or her race. By elevating minority-preferred minority candidates to this higher status, the majority embraces the very view of "electoral apartheid" that it rejects in part IV.A.1. *See* Maj. Op. at [13a].

II

I am also unable to join part IV.D., in which the majority holds that the "special circumstances" doctrine does not require a showing that white voters or politicians acted in the election in question with an intent to thwart the voting rights lawsuit. The majority holds that Ruiz has raised a triable issue of fact as to whether the 1994 election was representative of typical voting pattern in Santa Maria. Maj. Op. at [25a-26a].

This appeal does not require that we establish the framework for deciding when special circumstances surround a given election. In part III., we hold that the district court erred in holding that Ruiz's lawsuit had been mooted by the 1994 election. Thus, on remand, the district court may not rule in favor of the City merely based on the 1994 election. The factors that the majority identifies as demonstrating a triable issue of fact as to the special circumstances doctrine--the percentage of crossover voting, the endorsements of and financial support from nonminorities, and the

lawsuit itself--are ones that would enter the district court's ultimate *Gingles* inquiry. Thus, I would not reach this issue.

HAWKINS, Circuit Judge, concurring in part and dissenting in part:

I join the majority in all but part IV.A.2 of the Opinion. In a perfect world in which racial discrimination did not exist and its vestiges did not remain, each racial and ethnic community and interest group would need to "pull, haul, and trade to find common political ground." *Johnson v. De Grande*, 512 U.S. 997, 1020, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). We are not there yet. Instead, we live in a world in which political participation and opportunity are simply not equally available to a member of every race. To eradicate those voting practices with discriminatory results that "perpetuate the effects of past purposeful discrimination," Congress passed the Voting Rights Act, and federal courts enforce it. *See* S.Rep. No. 97-417, 97th Conga., 2d Sees. (1982), *reprinted* in 1982 U.S.C.C.A.N. 117, 218. In fulfilling our duty, we should be less concerned with creating bright-line rules and more dedicated to accomplishing justice for the parties.

The only virtue of the majority's bright-line rule is simplicity. "Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns," *Westwego Citizens for Better Government v. City of Westwego,* 872 F.2d 1201, 1203 (5th Cir. 1989) (citation omitted), the court should not resort to unyielding rules to decide these cases.

That is the defect inherent in the adoption of a strict bright-line rule. It is a "shortcut" that "fall[s] prey to the myopic presumption there is a minority preferred candidate in any race in which the minority votes." *Sanchez v. Colorado*, 97 F.3d 1303, 1320 (10th Cir. 1996). This rule prevents the district court from analyzing the historical environment and current choices facing minority voters. The result here is to confer "minority- preferred candidate" status even on those candidates who were the "least disfavored" among many disfavored candidates by minority voters.

A better approach is that adopted by the Third and Tenth Circuits which involves a "detailed, practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice." *Jenkins v. Red*

Clay Consol. School Dist., 4 F.3d 1103, 1129 (3d Cir. 1993); *see Sanchez*, 97 F.3d at 1321. This flexible approach considers four non-exhaustive factors: minority sponsorship of a candidate; the candidate's attention to minority issues or the minority community; the rate of minority turnout; and disincentives for minorities to run for office. *See Jenkins*, 4 F.3d at 1129. Only through such a searching inquiry can the district court best analyze the true choices facing minority voters and decide the extent of racially polarized voting under the third prong of *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

The danger of a "one-size-fits-all" bright-line rule is its unyielding rigidity and insensitivity to the particular facts of a voting rights case. The rule adopted by the majority here is by far the most unforgiving, absolute rule adopted by any circuit to consider the issue. Even those circuits which have adopted some form of a bright-line rule allow some factual inquiry into the "minority-preferred candidate's" support from minority voters. The Second Circuit, for example, sets a 50% minority-support threshold before considering a candidate "minority preferred." *See NAACP v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1019 (2d Cir. 1995). The Fourth Circuit, while presuming that a candidate who receives less than 50% of the minority vote but who would have won if the election were held only among minority voters is "minority preferred," nevertheless requires "an individualized assessment ... in order to confirm that such a candidate may appropriately be so considered." *Lewis v. Alamance County*, 99 F.3d 600, 614 (4th Cir. 1996), cert. denied, — U.S. —, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997). This prevents a candidate with tepid minority support from being considered in a *Gingles* prong three analysis. The majority's elimination of the 50% requirement opens the door for candidates only marginally favored by minority voters to count in the *Gingles* equation.

What makes the majority's adoption of this bright-line rule all the more surprising is that it is unnecessary to decide this case. The parties have hotly disputed nearly every issue from mootness to the special circumstances doctrine; the only thing they seem to agree on is that Tom Urbanske was a Hispanic-preferred candidate in 1988 and 1992. For each of the elections studied in this lawsuit, there is no dispute on this record as to the identity of the minority-preferred candidate. The rule the majority adopts today re-

solves nothing for these parties and adds nothing to the disposition of this particular case.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESPERANZA RUIZ; JOSEPH TALAUGON; ILTRA GARCIA; FRANCISCO DELGADO,

Plaintiffs-Appellants,

v.

CITY OF SANTA MARIA; CITY COUNCIL OF SANTA MARIA; ROGER BUNCH, Mayor; TORU MIYOSHI, BOB ORACH, JOSEPH CENTENO, and ABEL MALDONADO, City Council Members; and JANET R. KALLAND, City Clerk; all sued in their official capacities,

Defendants-Appellees.

No. 96-56564

D.C. No.
CV-92-04879-JMI
(Central California)

ORDER

FILED FEBRUARY 23, 1999

Before: WALLACE, TROTT, and HAWKINS, Circuit Judges.

Judge Wallace favored a rehearing as to parts IV.B and IV.D of the majority Opinion but voted to deny the petition for rehearing as a whole and recommended rejection of the suggestion for rehearing en banc. Judges Trott and Hawkins voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no judge of the court called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESPERANZA RUIZ; JOSEPH TALAUGON; ILTRA GARCIA; FRANCISCO DELGADO,

Plaintiffs-Appellants,

v.

CITY OF SANTA MARIA; CITY COUNCIL OF SANTA MARIA; ROGER BUNCH, Mayor; TORU MIYOSHI, BOB ORACH, JOSEPH CENTENO, and ABEL MALDONADO, City Council Members; and JANET R. KALLAND, City Clerk; all sued in their official capacities,

Defendants-Appellees.

No. 96-56564

D.C. No.
CV-92-04879-JMI
(Central California)

ORDER

FILED MARCH 15, 1999

Before: WALLACE, TROTT, and HAWKINS, Circuit Judges.

Appellees' Rule 41(b) Motion to Stay Issuance of the Mandate to Allow Time for Filing of Petition for Writ of Certiorari is GRANTED. The mandate is stayed for 30 days from the filed date of this Order.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ESPERANZA RUIZ, et al.,

Plaintiffs,

v.

CITY OF SANTA MARIA, et al.,

Defendants

CV 92-4879 JMI (SHx)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO FRCP 12 (b)(1) AND MOTION FOR SUMMARY JUDGMENT

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

ORDER GRANTING PLAINTIFFS' EX PARTE APPLICATION TO STRIKE

FILED SEPTEMBER 3, 1996

IT IS HEREBY ORDERED:

Defendants CITY OF SANTA MARIA, et al.'s Motion to Dismiss or in the Alternative Motion for Summary Judgment and Plaintiffs ESPERANZA RUIZ, et al.'s Motion for Partial Summary Judgment have came before this Court for review. Upon careful consideration, the Court hereby GRANTS Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), and, in the alternative, GRANTS Defendants' Motion for Summary Judgment; and DENIES Plaintiffs' Motion for Partial Summary Judgment. The Court also GRANTS Plaintiffs' Ex Parte Application to Strike Appendix B from Santa Maria's Reply.

BACKGROUND

Plaintiffs are four Hispanic residents of the City of Santa Maria. In sum, they allege that Defendant City of Santa Maria's at-large system of electing members of the city council and mayor violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. According to Plaintiffs, the 1990 census allegedly established that the Hispanic population of Santa Maria constitutes a majority in a single member district. The Plaintiffs allege the Anglo community votes as a bloc to defeat Hispanic candidates preferred by the Hispanic community and that the Defendant City deliberately maintains an at-large election system to dilute the Hispanic vote.

The City of Santa Maria's November 1994 election resulted in two Hispanic candidates, namely Joseph Centeno and Abel Maldonado, being elected to Santa Maria's city council.[1] Upon consideration and review of these election results, the Court sent an Order to Show Cause ("OSC") to the parties stating that, based on the 1994 election results, it "[c]oncluded that the Hispanic population in the City of Santa Maria has the ability to elect council members under the current at-large election system. Thus, the Court believes that a claim of vote dilution is now moot." See Order To Show Cause Why The Court Should Not Dismiss This Case As Moot ("Order To Show Cause"), filed October 24, 1995.

Before dismissing this action, the Court permitted the parties to brief the issue as to whether in fact this case has been rendered moot by the 1994 election results.[2] Defendants' response to the Court's OSC included a motion for summary judgment. The Court calendared this summary judgment motion in order to permit the parties to reply to the OSC responses filed by each side. Plaintiffs have since also moved the Court for partial summary judgment in this action.

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1 Hispanics now hold two of the four council seats and will continue to hold at least two seats through 1998.

2 The Court vacated the then current trial date of November 7, 1995 as well as cancelled the pre-trial conference set for Friday, October 27, 1995. The Court's Order stated that if it determines that the trial will go forward, a new trial schedule will be forthcoming.

DISCUSSION

I. DEFENDANTS' MOTION TO DISMISS

A. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants' response to the Court's OSC moved the Court to dismiss this action as moot under Federal Rules of Civil Procedure 12(b)(1) ("Rule 12(b)(1)"), 12(b)(6) ("Rule 12(b)(6)") and 56 ("Rule 56"). While Defendants acknowledge that motions to dismiss for mootness generally are brought under Rule 12(b)(1) for a finding that the Court lacks subject matter jurisdiction over the matter at issue, they also assert that some mootness motions are brought as Rule 12(b)(6) motions to dismiss for failure to state a claim.

The Court finds that a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction is, as Defendants concede, the most appropriate and common determination of a mootness question.

1. The Court Sua Sponte Raised The Mootness Question

The Court sua sponte raised the issue of mootness in this action. See Order To Show Cause. As this Court is one of limited jurisdiction and because mootness goes to a federal court's subject matter jurisdiction under Article III of the Constitution, the court's OSC was proper. DeFunis v. Odegaard, 416 U.S. 312, 315-16 (1974); Canez v. Guerrero, 707 F.2d 443, 446 (9th Cir. 1983).

2. Burden of Proof Lies With Plaintiffs

A contentious issue between the parties is which party has the burden of proof in establishing subject matter jurisdiction. Plaintiffs argue that because Defendants raised the issue of mootness, Defendants must carry the burden of proving lack of subject matter jurisdiction. Plaintiffs, however, incorrectly state that the Defendants raised the mootness issue. As discussed above, this court raised the mootness issue. See Order To Show Cause. Thus, as with any determination of subject matter jurisdiction not raised by defendant, Plaintiff bears the burden on the issue of mootness in this action. Kokkonen v. Guardian Life Ins. Co. of America, 114

S. Ct. 1673 (1994); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (party invoking federal jurisdiction bears the burden of establishing it); Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

3. Extrinsic Evidence May Be Considered By The Court

In determining whether this case is moot, the Court has been presented with and reviewed the results of the Defendant City of Santa Maria's November 1994 election results. As Defendants relate, in ruling on a Rule 12(b)(1) motion for dismissal for lack of subject matter jurisdiction, the district court "is not restricted to the face of the pleadings but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), cert.denied, 489 U.S. 1052 (1989).[3] Findings of fact and conclusions of law are unnecessary. Wilson v. State of Nevada, 666 F.2d 378, 380 n.2 (9th Cir. 1982). Thus, the Court has properly considered the 1994 election results in determining whether subject matter jurisdiction exists in the instant action.

B. MOOTNESS

1. No Effective Relief Can Presently Be Granted By This Court

Ninth Circuit cases establish that the legal test for determining mootness is whether 'events have occurred that prevent [the Court] from granting effective relief." Canez, 707 F.2d at 446. A case is moot "when the issues presented are no longer 'live' or the

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[3] This is unlike the standard employed for a Rule 12(b)(6) determination. In deciding a Rule 12(b)(6) motion for dismissal for failure to state a claim, the court may only consider matters within the pleadings. Levine v. Diamanthuest, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991) (citing North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). "If, on a [12(b)(6)] motion . . . for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

parties lack a legally cognizable interest in the outcome." Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988) (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982)). The basic question is whether there exists a present controversy as to which any effective relief can be granted. Id. Thus, if the Court finds that the results of the November 1994 election preclude it from granting effective relief to Plaintiffs in this action, the Court should grant Defendants' motion.

This action is brought under Section 2 of the Voting-Rights Act of 1965 ("VRA"), alleging a vote dilution claim which challenges the at-large system of election of the Santa Maria city council and mayor. Vote dilution occurs when a minority group is unable to elect candidates at-large whom it could elect within a single member district where the group is a majority. See Thornburg v. Gingles, 478 U.S. 30, 68 (1986); 42 U.S.C. § 1973.

Plaintiffs requested relief is for this Court to dismantle the current at-large system and replace it with single-member districts. Looking beyond the specific system requested, the Court notes that Plaintiffs' reason for bringing this action is the desire to elect Hispanic preferred candidates; in essence, arguing that under the current at-large system of election they are unable to elect Hispanic council members. As stated, if the Court finds that the requested relief – electing Hispanic preferred candidates – has already occurred under the current system, then the Court is precluded from granting Plaintiffs any effective relief in this action.

The recent election has resulted in two Hispanics being elected to the city council, who will serve on the council until after the 1998 election. Defendants assert that the 1994 election results render moot Plaintiffs' claim of vote dilution. However, as this is the first time in the city's history that Hispanics have been elected to the city council, Plaintiffs contend that the special circumstances doctrine applies to these recent election results and thus the results do not render this action moot. As set forth below, the Court has determined that the special circumstances doctrine does not apply to the 1994 election. Thus, in accordance with recent U.S. Supreme Court decisions, the Court finds that there is currently no effective relief that can be granted to Plaintiffs, as there is no injury at the present time.

a) Any relief granted would not pass the requisite strict scrutiny analysis

Continuously over the past several years, the U.S. Supreme Court has made clear that all race-based government decision-making, whether federal, state or local, is subject to strict scrutiny under the Fourteenth Amendment's equal protection clause. Shaw v. Hunt, 1996 WL 315870 (U.S.); Miller v. Johnson, 115 S. Ct. 2475 (1994); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). "A racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect. (internal citations omitted). This is true whether or not the reason for the racial classification is benign or the purpose remedial." Shaw v. Hunt, 1996 WL 315870, at *3 (U.S.) (citations omitted).

Santa Maria's electoral system is authorized by state law, indeed until 1955 general law cities were required by state law to elect at-large. Section 2 of the VRA authorizes a Court to impose an alternative system if its finds that a plaintiff has presented a viable claim of vote dilution. However, for a federal district court to order that a state approved electoral system be dismantled is extremely intrusive. Thus, only upon a finding of a compelling reason should this Court become involved in dismantling Santa Maria's electoral system.

With two Hispanics now in office, the Court finds that a compelling reason does not exist for the Court's interference with the current election system of Santa Maria. Plaintiffs' proffered single-member districting scheme is not narrowly tailored and thus would not pass strict scrutiny analysis.

2. Plaintiffs Have Not Proved That "Special Circumstances" Existed in the 1994 Election

Plaintiffs contend that the special circumstances doctrine applies to the recent election results and thus the results do not render this action moot. The U.S. Supreme Court in Thornburg held that an isolated minority success should be given less probative value if explained by "special circumstances." Thornburg, 478

U.S. at 57. The special circumstances doctrine, when such circumstances apply, requires courts to ignore or give less weight to elections that resulted in minority success. Special circumstances are occurrences that are markedly different from previous elections and that make the success unrepresentative of most elections, in which minority candidates usually lose. Id. at 75-76.

Plaintiffs argue that the 1994 election should be disregarded in determining whether racially polarized voting exists in Santa Maria. Plaintiffs contend that unusual circumstances existed during the 1994 elections which resulted in Hispanics being elected for the first time. Specifically, Plaintiffs claim that the Hispanic candidates elected received endorsements and monetary support that would not have been received save for the existence of this lawsuit. See Plaintiffs' Response to Order to Show Cause and Offer of Proof, pp. 10-12. Plaintiffs argue that the City was aware of this action and backed these candidates in order to prevent any showing of discrimination.[4]

Plaintiffs, however, have failed to present the Court with evidence showing that any acts were done to defeat the instant lawsuit. In fact, Plaintiffs concede that there is no evidence in this case that Anglos voted for Maldonado and Centeno in order to secure dismissal of the lawsuit, or Anglos gave money or endorsed them for that purpose. See Defendants' Statement of Uncontroverted Facts, ¶¶ 19-21. Plaintiffs contend that they do not have to prove intent, however, without even the slightest bit of evidence showing a connection between the donations and endorsements and this lawsuit, Plaintiffs' arguments cannot defeat the Court's finding that special circumstances doctrine does not apply to this case.

3. None of the Exceptions to the Mootness Doctrine Apply

Plaintiffs also contend Defendants must show that there is no chance of recurrence in order for mootness to apply. No chance of

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[4] Plaintiffs argue that the mayor of Santa Maria and other community leaders backed Hispanics for the first time, Hispanic candidates received unprecedented financial contributions, and one week prior to the election, a story regarding this lawsuit was in the local newspaper. See Plaintiffs' Response to Order to Show Cause and Offer of Proof, pp. 10-12.

recurrence is but one of several exceptions to the mootness doctrine, none of which apply to the facts of this case.

a) Plaintiffs fail to show that the alleged vote dilution is likely to recur

The first exception to the mootness doctrine is that the alleged wrongful conduct is likely to recur. See Deakins v. Monaghan, 484 U.S. 193, 199 (1988). This exception requires Plaintiffs to show there is a reasonable expectation that they will be subject to the challenged activity. City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983); Lee v. Schmidt-Wenzel, 766 F.2d 1387, 1390 (9th Cir. 1985).

Thus, as Defendants note, Plaintiffs have the heavy burden of demonstrating jurisdiction by establishing a "reasonable likelihood" or "reasonable expectation" or a "demonstrated probability" that they will be injured or subjected to vote dilution in the future or that the same controversy will recur involving the same litigants. Gamtel Corp. v. Community Redevelopment Agency of Los Angeles, 23 F.3d 1542, 1545 (9th Cir. 1994); Lee, 766 F.2d at 1390 ("the plaintiffs have the burden of showing that there is a reasonable expectation that they will once again be subjected to the challenged activity").

Upon review of the papers submitted, the Court finds that Plaintiffs are unable to meet this burden. As such, the first exception to the mootness doctrine does not apply to this action.

b) The instant issue does not fall into the exception "Capable of Repetition, Yet Evading Review"

The second exception to the mootness doctrine is whether the issue is likely to recur; commonly referred to as the "capable of repetition, yet evading review" exception. See United States Parole Commission v. Geraghty, 445 U.S. 388 (1980). This exception is not intended for the instant fact situation. Most commonly, the issue involves a challenged action that is too short in duration to be fully litigated by a plaintiff before the alleged harm ceases (i.e., pregnancy or political campaigns). Thus, an action is per-

mitted to proceed, notwithstanding the named plaintiff's current lack of a personal stake, if it can be shown that the challenged action was too short in duration to be fully litigated while in existence; and that there is reasonable expectation that the plaintiff or a class he or she represents will be subject to the same action again in the future. See Id. at 398; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563 (1980).

As the alleged vote dilution is not an issue that is too short in duration to be fully litigated before the harm ceases, the second exception is not applicable to the instant case.

c) Based on recent U.S. Supreme Court decisions there is no effective relief still possible

"As long as a court can grant any effective relief, it does not matter that the relief originally sought is unavailable due to changed circumstances." Church of Scientology of Cal. v. United States, 113 S. Ct. 447, 450 (1992). Here, because any relief still available would not pass strict scrutiny as set forth in recent U.S. Supreme Court decisions, the exception does not apply. See Discussion, supra, regarding strict scrutiny analysis.

C. CONCLUSION

A federal court has no authority to give opinions upon moot questions. County of Los Angeles v. Davis, 440 U.S. 625, 627-630 (1979); Aquirre v. S.S. Sohio Intrepid, 801 F.2d 1185 (9th Cir. 1986). Thus, based on the Court's determination of this case being rendered moot by the 1994 election results, this action is dismissed pursuant to Rule 12(b)(1).

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Defendants Are Also Entitled to a Summary Judgment Ruling

Defendants request this action also be dismissed pursuant to Rule 56.[5] Having dismissed this case under Rule 12(b)(1) as moot, this Court is precluded from making any judgment on the merits of this action. Thus, the Court is prevented from making a determination on Defendants', or Plaintiffs', summary judgment motion.

However, although this Court believes unlikely, if the special circumstances doctrine does create a triable issue of fact as to whether this case is in fact moot, as Plaintiffs contend, the Court will also make a ruling on Defendants' summary judgment motion. As set forth below, upon review of all of the documents submitted for this motion, the Court also dismisses this action pursuant to Rule 56.

B. Summary Judgment – Standard of Review

A motion for summary judgment provides a procedure for terminating without trial actions in which "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It is the moving party's burden to show the district court that there is an absence of essential evidence to support the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, the judge's function is not to weigh the evidence and determine the truth of the matter but to

---

[5] A non-moving party must be given notice of the summary judgment motion and an opportunity to respond. Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279 (9th Cir. 1986). As the Court notified the parties of its inclination towards dismissing the case as moot based on the 1994 election results and requested briefings from the parties on this issue, as well as setting the present motion on calendar to permit the parties to respond to one another's responses to the OSC, the notice and opportunity to respond requirements have been met for the Court's summary judgment determination.

determine whether there is a genuine issue for trial. Id. at 249-255.

There is no absolute right to a summary judgment in any case. The court has discretion to deny summary judgment wherever it determines that justice and fairness require a trial on the merits. Id.

C. Requirements of a Vote Dilution Claim

An alleged violation of Section 2 of the VRA as amended, 42 U.S.C. § 1973, is determined through a three-prong analysis set forth in Thornburg v. Gingles, 478 U.S. 30, 48-51 (1986). In order to prevail, a plaintiff must prove each of the following three prongs:

(1) that they are large enough and compact enough to constitute an effective voting majority in a single member district;

(2) that they are politically cohesive; and

(3) that white bloc voting usually defeats the preferred candidate of minority voters.

"Section 2(a) of the VRA prohibits the imposition of any electoral practice or procedure that 'results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.' In 1982, Congress amended the VRA by changing the language of § 2(a) and adding § 2(b), which provides a 'results' test for violation of § 2(a). A violation exists if,

> 'based on the **totality of circumstances**, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973(b)." Bush v. Vera, 1996 WL 315857, at *15 (U.S.) (emphasis added).

Based on the totality of the circumstances of the instant action, the Court has determined that Plaintiffs fail to prove a violation under prong three (3) of the Thornburg test.

D. Factors Showing Plaintiffs Failure to Prove Prong Three (3)

1. Results of the November 1994 Election

The results of the November 1994 election are strong evidence that White block voting does not usually defeat the preferred candidate of Hispanic voters. The first two preferences of Hispanic voters, both Hispanic candidates, were elected to the two council seats up for election for four year terms. See Defendants' Statement of Uncontroverted Facts and Admissions, ¶ 11. However, Anglo voters elected only one of their two preferred candidates for the two seats. Id. The first preference of Anglo voters was Bob Orach, who received only minimal support from Hispanic voters and thus was not elected. Id. However, candidate Abel Maldonado was elected despite not being one of the first two preferences of Anglo voters. Id.

2. Growth of the Hispanic Community in Santa Maria

Upon review of all of the statistics and expert testimony submitted, the Court finds that the eligible voting Hispanic population in Santa Maria is on the rise. See Defendants' Statement of Uncontroverted Facts and Admissions, ¶¶ 6-9; Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, pp. 29-34. There is strong disagreement between the parties as to the amount of this growth. However, it is clear to the Court that no matter how the experts present the statistics there is no doubt that over the last decade the number of *voting eligible Hispanics* has risen. See Romero v. City of Pomona, 883 F.2d 1418, 1426 (9th Cir. 1989).

3. The Use of a Bullet-Voting System in Santa Maria

The current election system employed in Santa Maria provides the greatest opportunity in an at-large system for a minority group to elect a preferred candidate. As explained in Defendants' Re-

sponse to the Court's OSC, "[i]n Santa Maria voters may cast two ballots in each election for the two open Council seats, but there is no 'anti-single shot' requirement that they must do so for their ballot to count. If they so choose, Hispanic voters may 'bullet vote' or cast just one ballot for a single Hispanic candidate and deny Anglo candidates their other vote, thereby improving the chances of electing the Hispanic candidate." See Defendants' Response to the Court's OSC, p. 9.

4. Hispanic Preferred Candidates Have Won in the Last Four Elections

In order to prevail under Section 2, Plaintiffs must prove that White bloc voting usually defeats the **preferred candidate** of minority voters. Thornburg, 478 U.S. at 48-51. Plaintiffs cannot prevail merely by showing that Hispanic candidates are usually defeated. See Shaw v. Hunt, 1996 WL 315870, at *10 (U.S.); Bush v. Vera 1996 WL 315857, at *20 (U.S.) ("Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes").

In three of the last four city council elections, the first preference of Hispanic voters was elected: Tom Urbanske in 1988 and 1992 and Abel Maldonado in 1994. See Defendants' Statement of Uncontroverted Facts and Admissions, ¶ 10. Although Mr. Urbanske is not Hispanic, he was the first preference of Hispanic voters and thus his election provides the Court with evidence that Hispanic preferred candidates are not usually defeated by White bloc voting.

5. Strict Scrutiny Analysis

Finally, the Court had determined, supra, that any relief that could possibly be provided to Plaintiffs would not pass strict scrutiny analysis, pursuant to recent U.S. Supreme Court decisions.

Thus far, the U.S. Supreme Court has assumed that compliance with the results test of § 2(b) can be a compelling state interest. Bush v. Vera, 1996 WL 315857, at *15 (U.S.). Based on the above analysis, the Court has determined that Plaintiffs' action has not passed the results test of the VRA. Therefore, compliance

with VRA also does not provide Plaintiffs with a compelling interest.

E. Conclusion

"A Court must . . . ultimately find based on the totality of [all relevant] circumstances that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Shaw v. Hunt, 1996 WL 315870 *9 (U.S.) (citing 42 U.S.C. § 1973(b); Johnson v. De Grandy, 114 S. Ct. 2647, 2650 (1994)).

Upon review of the circumstances of the voting strength of the Santa Maria Hispanic community, the Court does not find that the Hispanic community has less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

III. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs move the Court for an order for partial summary judgment pursuant to Rule 56(d), finding that Hispanics in the City of Santa Maria are sufficiently large and geographically compact to constitutes a majority of the voter-eligible population in a single-member district, and that Plaintiffs have thus satisfied the first prong of the three-prong analysis set forth in Thornburg.

Plaintiffs motion is DENIED. The Court has determined that this action has been rendered moot by the 1994 election results. Thus, it is irrelevant whether or not Plaintiffs have satisfied the first prong of Thornburg.

IV. PLAINTIFFS' EX PARTE APPLICATION TO STRIKE APPENDIX B FROM SANTA MARIA'S REPLY

Upon consideration and review, the Court hereby GRANTS Plaintiffs' ex parte application to strike Appendix B from Santa Maria's reply to Plaintiffs' opposition to Defendants' summary judgment motion. Thus, the Court did not consider the contents of Appendix B in deciding Defendants' summary judgment motion.

IT IS SO ORDERED.

DATED: August 28, 1996

/s/

JAMES M. IDEMAN
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ESPERANZA RUIZ, JOSEPH TALAUGON, ILTRA GARCIA and FRANCISCO DELGADO,

Plaintiffs,

v.

CITY OF SANTA MARIA, CALIFORNIA; CITY COUNCIL OF SANTA MARIA; ROGER BUNCH, Mayor; TORU MIYOSHI, BOB ORACH, JOSEPH CENTENO, and ABEL MALDONADO, City Council Members; and JANET R. KALLAND, City Clerk; all sued in their official capacities,

Defendants.

Case No. 92 4879 JMI (SHx)

FILED NOVEMBER 17, 1995

STATEMENT OF UNCONTROVERTED FACTS AND ADMISSIONS ADVERSE TO PLAINTIFFS IN SUPPORT OF SANTA MARIA'S RESPONSE TO OCTOBER 27, 1995 ORDER

* * *

Undisputed Facts	Evidentiary Support
19. Joe Centeno has lived in Santa Maria nearly all his life, was with the Police Department for 35 years and was Chief of Police for 10 years. Plaintiffs concede that Joe Centeno had high name recognition and was thought of highly in the community, and did not need district elections to get elected. Dr. Engstrom admitted that Mr. Centeno's election was not a fluke and that he would be a formidable candidate any time he chose to run, and that Hispanic candidates with certain characteristics can get elected at-large. Plaintiff Joe Talaugon was not surprised Centeno won. Abel Maldonado is a young Hispanic businessman and Republican who grew up in Santa Maria, whose family has been in Santa Maria for years. He spent more money and put up more signs than anyone else. Plaintiff Joe Talaugon was not surprised Maldonado won.	Talaugon Testimony (See Section III.E., herein); Rabinovitz Declaration, Exh. C (at pp. 1-8); Engstrom Testimony (See Section III.A.2., herein).

* * *

[Testimony of Richard L. Engstrom, Expert Witness for Plaintiffs]

LOS ANGELES, CALIFORNIA; WEDNESDAY, SEPTEMBER 13, 1995;
10:03 A.M.

RICHARD L. ENGSTROM,
having been first duly sworn,
was examined and testified
as follows:

EXAMINATION

BY MR. McDERMOTT:

Q. Would you state and spell your full name for the record, please?

A. My name is Richard L. Engstrom, and the last name is spelled E-n-g-s-t-r-o-m.

(4)

* * *

Q. Fair enough. But now that you have examined the '94 election, what I'm trying to find out is whether you are attributing the results of the '94 election, particularly the election of Maldonado and Centeno, due to the fact that there was pending litigation?

A. I have no evidence that there is a direct linkage between their election and the pending litigation.

Q. I take it that you are not contending that Anglo voters voted for Maldonado and Centeno in hopes of ending the lawsuit or for the purpose of ending the

(13)

lawsuit?

A. I don't know that that's the case.

Q. Based on the deposition, there is no evidence of that?

A. I would agree, I have no evidence of that.
Q. And I take it that you are not contending that Hobbs and Tunnell endorsed Maldonado and Centeno for the purpose of electing an Hispanic to end the lawsuit?
A. I don't know whether they did that or not.
Q. Based on the depositions, there isn't any evidence of that, is there?
A. That there was a deliberate effort to moot the lawsuit?
Q. Yes.
A. There is no evidence of that in the depositions.
Q. And I take it that you are not contending that the money provided to Maldonado and Centeno by Anglo contributors was given to them for the conscious, explicit purpose of trying to end the lawsuit?
A. I have no evidence that that was the case.

(14)

* * *

Q. Isn't it true, based on the depositions, that neither the winners nor the losers believe that the litigation had any impact on the outcome of the election?
A. Well, I don't know about all the losers, but I would say from the depositions, I have no evidence that anybody directly attributed the outcome to the lawsuit.

(15)

* * *

This is not a situation where Anglos supported a minority candidate whom minorities did not support, correct?
A. By minority voters, that is correct.

(17)

* * *

Q. Let me restate it, because I thought I got it right. Both he and others testified that Orach and

his candidacy was hurt because Orach had declared for mayor initially, then changed his mind and ran for City Council when George Hobbs declared for mayor at the last minute?

A. Yes.

Q. Nonetheless, Orach was the Anglo of first preference –

A. Correct.

Q. – and he lost?

A. Correct.

Q. The Anglo first preference was vetoed by Hispanic voters, correct?

A. In the sense that if only non-Hispanic votes had been counted and Anglo votes had been

(18)

counted, he would have won. So in that sense, yes.

Q. So Hispanics elected both their preferences for the two seats that were open?

A. In '94, that's the case, yes.

Q. And Anglos elected only one of theirs?

A. Correct.

* * *

Q. Maldonado wouldn't have been elected if only Anglo or non-Hispanic votes had been counted, correct?

A. Correct.

(19)

* * *

If we turned to Table 4. . . let me find it here. In '92, Firth was the non-Hispanic second preference, correct?

A. Yes.

Q. And he would have been elected if oniy Anglo or non-Hispanic votes had been counted, correct?

A. Correct.

Q. So he was the Anglo preference in '92 and was vetoed by Hispanic voters, correct?

A. In the sense that he would have won if there had not been – if Hispanic votes had not been

counted, yes.

(20)

* * *

Q. In both '92 and '94, Hispanics were able to defeat Anglo preferences, who would have been elected if only Anglo or non-Hispanic votes had not been counted?

A. Correct.

(21)

* * *

The Anglo, non-Hispanic support for Hobbs and Bunch is such that it is not statistically significantly different between the two candidates if you accept those regression results, correct?

A. I think that would be the case, yes.

* * *

Q. Hispanics favored Bunch over Hobbs?

A. According to these tables, yes.

(22)

Q. And if the non-Hispanic vote is non-determinant as to who they preferred, Hispanic voters made the difference in who got elected mayor?

A. That appears to be the case, based on this table, yes.

(23)

* * *

Q. You have read all of the depo transcripts of all of the participants in all of the elections?

A. I believe all but two.

Q. And which two are those?

A. I think -- I think there may be a Volume II for Orach in '93 that I have not finished.

Q. There was -- his original deposition was two volumes.

A. I read the first volume.

Q. Okay.

A. And I have been into the second volume,

but have not been able to complete it.
Q. And what's the other?
A. The other is, I think, Urbanske in '93.
Q. That was one volume.
A. Yes.
Q. One day as I recall.
So everybody -- all the other transcripts you have read?
A. Yes.
Q. And that would include Guevara's original transcript?
A. Correct.

(28)

Q. Felix Martel?
A. Correct.
Q. Castillo?
A. Correct.
Q. Margie Lopez?
A. Right.
Q. Bob Orach, except for the one volume?
A. Yes.
Q. And Curtis Tunnell?
A. Yes.
Q. You read all of those?
A. Yes.
Q. Are you aware from the original Guevara deposition that he considered Martel, Lopez or Castillo as serious candidates?
A. I don't recall that.
Q. Are you aware that none of those three candidates have been in the community very long, or had done things in the community, or done very little in the community?
A. I'm aware of that for Lopez, and Castillo had not lived in Santa Maria for a long time. Did you also include Martel?
Q. Yes.
A. I don't recall that for Martel.

(29)

* * *

Q. I changed the framing of it around because we are getting hung up on "quality." And I'm talking about the Anglo voters, and you may have your views about quality, but I'm just simply asking whether it's plausible that instead of race, what explains the difference in outcome in '94 is that Anglo voters were responding to what they perceived as differences in the candidates who ran in '94, from those who ran prior -- in prior elections. Isn't that plausible?

(35)

A. That could be.

(36)

* * *

Q. I read your report as saying that Centeno was a quality candidate who was well known to both Hispanics and Anglos, had served the public through the police department, and ran a high profile, well-financed campaign. Fair enough?

A. Well, he had high name recognition, according to the deponents, coming into the election, based on his experience as the police chief in the city.

Q. Right.

A. And everything in the depositions indicated that people viewed his experience as police

(43)

chief positively.

Q. And don't you also assume that people, both Hispanic and Anglo, are also responding to the man? I mean, they knew him, they knew him as a serious, legitimate person who they could trust and rely on?

A. I would think that many people in the community knew of him, recognized his name and thought highly of him.

* * *

Q. Would it be fair to say that Joe Centeno

(44)

doesn't need district elections to get elected? He certainly didn't before?

A. He's certainly been elected at-large, correct.

Q. You are not contending that his election was a fluke?

A. Centeno's election?

Q. Yes.

A. No, I'm not.

Q. He would be a formidable candidate any time he ran?

A. I would suspect that would be the case, yes.

(45)

* * *

Q. So Hispanic candidates who have certain characteristics can get elected under Santa Maria's at-large election system?

A. Hispanic candidates have been elected under the system, so I suppose there are certain characteristics that one could say, candidates with those characteristics can be elected.

(46)

* * *

Would you agree that Castillo had not lived long in the community, or wasn't well known to either Hispanics or Anglos before he ran?

A. I believe he had not lived what one would consider a long time in the community. His visibility among Hispanics, I don't know. Apparently there is some confusion over his name and the name of his jewelry shop or something. I remember that.

* * *

(48)

Q. Except for Maldonado, correct me if I'm wrong, but Benedetti, Snyder and Firth all spent more than any other City Council candidate -- now I'm talking about the four council seats -- in these four

elections?
A. I think that's the case, yes.
Q. And they all lost?
A. Correct.

(49)

* * *

Q. So my question is, are you contending that there were special circumstances present in this election in November, 1994?

(58)

A. Compared to previous elections, yes.
Q. Okay.

* * *

(59)

And my point is, if an Hispanic candidate

(62)

ran, regardless of whether Hispanic -- what the Hispanic vote for that candidate was, wouldn't you expect an Hispanic candidate, who lived in the community a long time, to have a better chance of attracting stronger Anglo support than an Hispanic who hadn't lived in the community very long?
A. Everything else being equal, it's plausible.

(63)

* * *

Q. Abel Maldonado, even though he's only 26 years old, both he and his family have lived in Santa Maria for many years, yes?

(64)

A. I don't recall how long the family may have been here, but I believe he grew up there.

(65)

* * *

Wouldn't you expect that the Anglo support for an Hispanic candidate to be lower in an election

for two seats where there are two incumbents, than would be the case in an election without incumbents, all other things being equal?

A. All other things being equal?

Q. Yes.

A. If incumbency was perceived as a favorable characteristic at that time, yes.

(71)

* * *

Q. And incumbents usually win, correct?

A. As a general matter, yes.

Q. They have an advantage over non-incumbents, correct?

A. As a general matter, yes.

(76)

* * *

Q. There has never been an instance in those four City Council elections where an Anglo challenger unseated an Anglo incumbent, correct?

A. Hmm, let me. . . well, my memory escapes me, but was Firth an incumbent in '92?

Q. Oh, yes.

A. So you are not – okay. Miyoshi is not an Anglo.

Q. Not an Anglo. So your answer to my question is yes?

A. Well, let me look at the other tables. I forget who had incumbency status at every particular point in time. That's mayor. . .

Like I said, I don't recall if Firth was an incumbent.

(77)

Q. In '88?

A. Yeah.

Q. But Urbanske was?

A. I don't recall that either.

Q. You don't recall that either? Okay.

A. Tunnell I do recall being an incumbent; and Orach, I don't recall if he was, but –

Q. He was elected in '88 --
A. So --
Q. -- or '86, I mean.
A. So, yes, not including -- excluding Miyoshi, because he's Asian, I guess my answer is yes.

(78)

* * *

Q. Isn't the fact that there is increasing Hispanic -- an increasing number of Hispanic registrants and people turning out -- Hispanics turning out to vote, as a percentage of all voters, helpful to Hispanic candidates?
A. I believe so, yes.
Q. It improved the chances of the Hispanic candidates in '94, compared to the Hispanic candidates running in 1988?
A. That would be true.
Q. The four percent increase constitutes how many voters, roughly?
A. I don't recall.
Q. More than 84?
A. I believe it would have constituted more

(93)

than 84, yes.

(94)

* * *

Q. The '94 is a much better indication of -- is a better indication of the voting strength of Hispanics than the 1988 statistics, right?
A. Concerning today?
Q. Yes.
A. Yes.
Q. If a judge were sitting here saying what's the likelihood a Hispanic is going to get elected utilizing the '94 election, at least with respect to voting strength it's more closely associated with that than the 1988 election?
A. Correct.

(95)

* * *

Q. Are you aware that there is a significant increase in recent years in Hispanics naturalizing and gaining citizenship than was true in prior years?
A. I believe that is the case, yes.

(96)

* * *

Would it be fair to say that given demographic factors, naturalization trends, registration increases due to Motor Voter Laws, that Hispanic registration and turnout is likely to increase in the future in Santa Maria?
A. It would be my understanding that the city is becoming more Hispanic, and more of them will be able to register and vote, yes.
Q. So as time passes, their voting strength will increase?
A. Well, that's if everything stays the same and the trends continue.
Q. Okay, will you say that again?
A. You are talking – you are projecting.
Q. Yes.
A. So if things stay the same in terms of the trends, then that would happen.

(97)

* * *

Q. Would you agree that Hispanic chances of getting elected at-large are increasing in Santa Maria?
A. As the electorate gets more Hispanic?
Q. Yes.
A. Yes.

(98)

* * *

Q. But my point is, over four City Council elections, Hispanics elected four of their sev... preferences?
A. Well, wouldn't there have to have been

eight preferences?
Q. Well, not if you -- I don't think so, no.
But they elected four preferences over those four
elections?
A. Four times, yes.

(101)

* * *

MR. McDERMOTT: Okay. You have plenty of
time.
(Whereupon, at 12:27 P.M.,
the deposition of RICHARD L. ENGSTROM
was adjourned.)

RICHARD L. ENGSTROM

(112)

* * *

[Deposition Testimony of Plaintiff Joseph Talaugon From *Ruiz v. Santa Maria*].

Santa Maria, California
Wednesday, October 4th, 1995
4:20 p.m.
JOSEPH TALAUGON,
Having been sworn, testified as follows:
EXAMINATION
BY MS. DOMINGUEZ SILVERS:
Q. Good afternoon, Mr. Talaugon. Am I pronouncing
it correctly?
A. Talaugon.
Q. Talaugon?
A. Talaugon.
Q. My name is Aimee Dominguez Silvers, and I'm here
on behalf of the City of Santa Maria. I'm going to ask you
a few questions that will kind of update your previous
deposition. Do you remember when your deposition was taken
in this case?
A. Um-hum, yeah.
Q. So we're going to focus primarily on the 1994

23 elections.
24 A. Yeah.

(4)

* * *

13 Q. BY MS. DOMINGUEZ SILVERS: We were talking about
14 Mr. Centeno's campaign. First of all, in your opinion,
15 what is the city-wide impression or perception of
16 Mr. Centeno?
17 A. City-wide impression?
18 Q. Um-hum.
19 A. I don't know.
20 Q. Is he well-respected?
21 A. I don't know that. I know that he's got a -- his
22 background, being a Chief of Police, I think that people
23 know him by that.
24 Q. Would you consider him a well-respected figure in
25 the community?

(48)

1 A. Yes, I would say that.

(49)

* * *

17 Q. In your opinion, based on what you observed, did
18 Mr. Centeno run a good campaign?
19 A. Mr. Centeno?
20 Q. Yes.
21 A. What do you mean by "good campaign"?
22 Q. Able to influence the public to vote for him, get
23 his message out, be out there?
24 A. I don't know if he ran a good campaign.
25 Q Were you surprised when he won?

(57)

1 A. No.

(58)

* * *

6 Q. Was, in your opinion, Mr. Centeno the best known

of all of them?
A. I don't know that.
Q. No, your opinion. Just out of the candidates that come to your mind, is Mr. Centeno the most known in terms of name recognition out of the community?
A. You mean, out of all of the candidates?
Q. Yeah.
A. Best known?
Q. Or one of the one or two best knowns, let's put it that way.
A. Mr. Centeno, to be known, I would say he was pretty much at the top.
Q. At the top?
A. At the top, yeah.

(71)

* * *

If Mr. Maldonado received a significantly greater Hispanic support than Mr. Centeno did, would you be surprised?
A. I have to base my answer on his exposure again, his publicity.
Q. So is the answer, "No, I'm not surprised"? "Yes, I am surprised"?

(100)

A. I'm not surprised.
Q. Okay. Because?
A. Because he got more exposure.

(101)

* * *

MS. DOMINGUEZ SILVERS: Then, I think I will leave my diagram out and let the record stand the way it is the way he's testified regarding the impact of district elections. I have no other questions.
(WHEREUPON THE DEPOSITION WAS CONCLUDED AT 7:30 P.M.)

–oOo –

(140)

* * *

I declare (or affirm) under penalty of perjury, under the laws of the State of California, that the foregoing testimony is true and correct.

Signed and dated this _____ day of 1995, at _____, California.

_____

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(141)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ESPERANZA RUIZ, JOSEPH TALAUGON, ILTRA GARCIA and FRANCISCO DELGADO,

Plaintiffs,

v.

CITY OF SANTA MARIA, CALIFORNIA; CITY COUNCIL OF SANTA MARIA; ROGER BUNCH, Mayor; TORU MIYOSHI, BOB ORACH, JOSEPH CENTENO, and ABEL MALDONADO, City Council Members; and JANET R. KALLAND, City Clerk; all sued in their official capacities,

Defendants.

Case No. 92 4879 JMI (SHx)

FILED JANUARY 22, 1996

SANTA MARIA'S RESPONSE TO PLAINTIFFS' SEPARATE STATEMENT OF FACTS IN OPPOSITION TO SANTA MARIA'S MOTION FOR SUMMARY JUDGMENT

* * *

22. Santa Maria Fact Plaintiffs have created a Thornburg district containing a quarter of Santa Maria's total population and in which Hispanics are a 57% majority of the voting age citizens and registrants. Non-Hispanics or Anglos would be a majority of the voting age citizens and registrants in the other three districts. Santa Maria Evidentiary Support Ely Testimony (See [pp. 55-57 of Santa Maria Statement]); Morrison Declaration, Exh. A (at p. 21-22). Santa Maria Response Plaintiffs do not dispute this fact. Any "future" dispute about the ability to draw two Hispanic districts is clearly immaterial and irrelevant to Santa Maria's motion. As discussed in Santa Maria's Reply, the legal issues surrounding plaintiffs' proposed Thornburg district are clearly relevant to Santa Maria's motion and cannot be reserved until the remedy stage.	Plaintiffs Response Defendants claim that "Non-Hispanics or Anglos would be a majority of the voting age citizens in the other three districts." [citation omitted] Plaintiffs do not at this time dispute this fact, although it may be possible to draw two Thornburg districts in Santa Maria, and the statement would no longer be true. However, Plaintiffs contend that Defendants' contention is legally irrelevant to the issues to be determined at trial and in this summary judgment motion.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ESPERANZA RUIZ, *et al.*,

Plaintiffs,

v.

CITY OF SANTA MARIA, CALIFORNIA, *et al.*,

Defendants.

No. CV-92-4879-JMI (SHx)

DECLARATION OF IRMA RODRIGUEZ IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

* * *

DECLARATION OF IRMA RODRIGUEZ

I, IRMA RODRIGUEZ, declare under penalty of perjury that:

1. I am counsel of record for Plaintiffs in this case. I have personal knowledge of each of the facts set forth herein. I make this declaration in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment.

* * *

6. Attached hereto as Exhibit C is a true and correct copy of a summary of the expenditures of and donations to Santa Maria city council and mayoral candidates who filed financial disclosure forms with the Santa Maria City Clerk from 1988 to 1994. On information and belief, the data found on these summaries is accurate. This summary was prepared by Jaime Guerrero, a former lawclerk for Plaintiffs. I instructed Mr. Guerrero to review every financial disclosure statement filed by these candidates and to summarize them in the manner they are presented. A summary is attached hereto because the actual forms amount to over 2,000 pages. Plaintiffs are willing to provide these documents to the Court at the Court's request. A copy of this summary has been provided to Defendants under F.R.C.P. 26(b) as underlying materials used by Dr. Engstrom in his August 8, 1995 Report and a copy of the financial disclosure forms have also been provided to Defendants.

7. Based on the Santa Maria City council and mayoral candidates' financial disclosure summaries prepared by Mr. Guerrero, Margie Lopez raised $11,775.80 for her 1990 mayoral campaign; Gil Guevara raised $7,170.68 for his 1990 mayoral campaign; and Fernando Castillo spent $5,514 in 1990 for his mayoral campaign. In 1992, Mr. Castillo raised $1,670 and J. Stephan Jerger raised $1,145 in their campaigns for City Council. In 1994, Abel Maldonado raised $31,987, the largest amount by any candidate. He loaned himself $16,000. The candidate who spent the second-highest amount on his councilmanic campaign in 1994 was Trent Benedetti who raised $11,802.52. The council candidate raising the most money in 1988 was Floyd Snyder raising $11,976, in 1990 was Gil Guevara raising $7,170.68 and in 1992 was Toru Miyoshi who raised $7,323.

* * *

12. Attached hereto as Exhibit J is a true and correct copy of a memorandum which I prepared analyzing the racial and ethnic background of financial contributors to Hispanic candidates from 1988 to 1994. In preparing this memorandum I reviewed the list of contributors identified in the summary prepared by Jaime Guerrero, attached hereto as Exhibit C. The racial identification of the contributors was determined by the methods described in the memorandum. The interviews were conducted by Plaintiffs' paralegals.

* * *

[EXHIBIT C]

Monetary Contributions Received

1994 - TRENT BENEDETTI (candidate)

	8/12-9/30	10/1-10/22	10/23-12/31	Totals
[List of Donors Omitted]				* * *
Totals	3,803.00	4,444.28	3,555.24	$ 11,802.52

1994 - JOE CENTENO (candidate)

	1/1-9/30	10/1-10/22	10/23-12/31	Totals
Joe Centeno Loan	3,100.00			$ 3,100.00
[List of Donors Omitted]				* * *
Totals	7,170.00	2,248.00	1,578.00	$ 10,996.00

1994 - GIL GUEVERA (candidate)

	7/1-9/30	10/1-10/22	10/23-12/31	Totals
Gil Guevara (Loan)	450.00	300.00		$ 750.00
[List of Donors Omitted]				* * *
Totals	749.00	1,197.00	802.78	$ 2,748.78

[Two Candidates Omitted] * * *

1994 - ABEL MALDONADO (candidate)

	8/1-9/30	10/1-10/22	10/23-12/31	Totals
Agro-Jal Farms, Inc. (Loan)		5,000.00	11,000.00	$ 16,000.00
[List of Donors Omitted]				* * *
Totals	4,158.00	10,745.00	17,084.00	$ 31,987.00

[Candidate Omitted] * * *

1994 - ROBERT S. ORACH (candidate)

	1/1-6/30	7/1-9/30	10/1-10/22	10/23-12/31	Totals
Robert S. Orach (Loan)	200.00	200.00			$ 400.00
[List of Donors Omitted]					* * *
Totals	295.00	2,650.00	3,196.00	1,964.00	$ 8,105.00

[EXHIBIT J]

CONFIDENTIAL MEMORANDUM

The following analysis is based on interviews with candidates Martel, Lopez, Castillo and Guevara. The list of contributors is taken from the list prepared by Jaime Guerrero as those who contributed to the Hispanic candidates based on the financial disclosure forms. For those who contributed to the Maldonado and Centeno campaign an attempt was made to interview them. (interview script attached) If the contribution was made by a company, the person who owned the company or the person who was identified as the person who would make the decision to make a donation to Maldonado or Centeno was interviewed. If a person was unavailable for an interview or unwilling to be interviewed, a determination of the racial background of the contributor was ascertained by asking Plaintiffs, and/or previous Hispanic candidates. The Plaintiffs and previous Hispanic candidates knew who these persons were either because they had had contact with them because they were farmers or because they were business owners with whom they had interacted or they knew them from other contexts. If they did not know, then the racial background of contributors was ascertained through use of the 1980 Census List of Spanish Surnames. Those persons who identified themselves as Portuguese, were not considered Hispanic. If a contributor is Portuguese, this is marked by a "P" next to their ethnic category.

For those joint contributions for whom one of the contributors was Hispanic, we considered the donation to have been made by a Hispanic. It will be noted in the "source" column how we verified the racial background of the contributors.

Contributors to Hispanic Candidates[1]
1988-1994

[1988, 1990, 1992 Candidates Omitted] * * *

1994 Gil Guevara

[List of Donors Omitted] * * *

TOTAL AMOUNT RAISED	$1,998.78
TOTAL AMOUNT FROM NON-HISPANICS	$ 252.78
TOTAL NUMBER OF CONTRIBUTORS	9
TOTAL NUMBER OF NON-HISPANIC CONTRIBUTORS	2

1994 Joseph Centeno

[List of Donors Omitted] * * *

TOTAL AMOUNT RAISED	$7,896
TOTAL AMOUNT FROM NON-HISPANICS	$4,550
TOTAL NUMBER OF CONTRIBUTORS	17
TOTAL NUMBER OF NON-HISPANIC CONTRIBUTORS	13

1994 Abel Maldonado

[List of Donors Omitted] * * *

TOTAL AMOUNT RAISED	$15,987
TOTAL AMOUNT FROM NON-HISPANICS	$ 6,625
TOTAL NUMBER OF CONTRIBUTORS	52
TOTAL NUMBER OF NON-HISPANIC CONTRIBUTORS	27

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1 These contributions do not include loans that the candidates made to themselves. The total amount raised also does not include loans the candidates made to themselves. The total amount raised also includes the amount raised from non-itemized contributions.

Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

(2)

No. 98-1666

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF SANTA MARIA, ET AL.,
Petitioners,

v.

ESPERANZA RUIZ, ET AL., *Respondents*,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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56pp

QUESTIONS PRESENTED

Section 2 of the Voting Rights Act of 1965, as amended, allows consideration of the "extent to which members of a protected class have been elected to office...." 42 U.S.C. 1973. The United States Court of Appeals for the Ninth Circuit held that summary judgment was inappropriate as to the effect of Anglo bloc voting on the success of minority-preferred candidates.

Respondents submit that the Questions Presented are:

1. Whether there should be a trial to resolve disputed facts on the merits of whether Anglo bloc voting usually defeats the choice of Latino voters, and that in weighing the evidence the District Court should pay particular attention to the defeat of minority-preferred minority candidates in multi-seat, multi-vote elections.

2. Whether the unprecedented success of Latino candidates in a post-lawsuit election required trial court fact-finding as to the unusual circumstances surrounding the election.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding at the time the case was dismissed by the District Court in 1995. Elections are held every two years in Santa Maria. *Ruiz v. City of Santa Maria*, 160 F.2d 543, 546 (9th Cir. 1998). Defendants who are council members are sued in their official capacities, and Plaintiffs intend to move to substitute Defendants to reflect the results of the 1996 and 1998 elections should the case be remanded to the District Court.

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No. 98-1666

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF SANTA MARIA, ET AL.,
Petitioners,

v.

ESPERANZA RUIZ, ET AL., *Respondents*,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The interlocutory procedural posture and intensely factual nature of this case make it a poor vehicle for reviewing the issues raised by Petitioner. Regardless of the outcome of the Petition, the case will have to be remanded for trial of the numerous outstanding disputed facts. Following trial and appeal, this Court would have the benefit of fully-litigated factual findings and legal analysis. Furthermore, Certiorari is unwarranted because the Ninth Circuit decision is consistent with this Court's prior decisions and with the law of the Circuits.

Santa Maria's Petition overstates the holding and the effect of the Ninth Circuit's ruling. The opinion appropriately guides the

District Court on remand for a trial that has been pending for nearly seven years, without compelling any particular conclusion on any issue. Certiorari should be denied.

FACTUAL ISSUES

Petitioners' Statement of Facts demonstrates the factbound nature of this case and the need for trial court resolution of the evidentiary issues prior to this Court's review. Indeed, Petitioner rests support for a number of "facts" on selected deposition and declaration excerpts and argumentative pleadings submitted to the District Court by both sides to support factual contentions at issue prior to the District Court's dismissal of the case. See Petitioners' Appendix 54a-70a, (hereinafter "Pet. App.").[1] Moreover, Petitioners' Statement of Facts takes broad liberties with its portrayal of the "facts" contained in the supporting documentation, a penchant which renders this factually complex case even more inappropriate for determining broad legal issues, and which argues for a fully developed factual record prior to hearing in this Court. Perhaps the best example of unresolved evidence contained in the Petition's statement of facts is a reference to post-dismissal election results – evidence that was

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[1] That Petitioner styled the appended pleading "Statement of Uncontroverted Facts and Admissions," (Pet. App. 54a - 70a) does not render its contents factually binding, and Respondent reserves the right to contest the conclusions therein. Accordingly, Respondents append to this Opposition their responsive pleading filed below -- "Plaintiffs' Separate Statement of Facts in Opposition to Santa Maria's Motion for Summary Judgment." Respondents' Appendix, 1a-36a (hereinafter "Resp. App."), filed January 17, 1996, C.R. 233. Another of Petitioners' Appendices, at 71a-72a, is styled "Santa Maria's Response to Plaintiffs' Separate Statement of Facts in Opposition to Santa Maria's Motion for Summary Judgment," a title which concedes its disputed factual nature.

obviously not in the District Court record, and that was the subject of Petitioner's motion for judicial notice which was *denied* by the Ninth Circuit. *Ruiz v. Santa Maria*, 160 F.2d 543, 548, n.13 (9th Cir. 1998), Pet. App. 7a, n. 13. (Hereinafter, for ease of reference, citations will be to pp. 1a-35a of Petitioners' Appendix, where the *Ruiz* opinion is reproduced.)

The facts set forth in the *Ruiz* opinion demonstrate that the Appellate Court reversed the preclusive District Court rulings to prevent an unjust and unsupportable dismissal of the lawsuit. The Ninth Circuit instructed the lower court to take these facts into account when considering the totality of the circumstances - facts that were omitted from the Petition's Statement of Facts.

First, prior to the lawsuit, no Latino had ever been elected mayor or council member. *Ruiz*, Pet. App. 3a.. While Latino candidates were the first or second preference of Latino voters in each election analyzed, Latino candidates were the least-preferred among non-Latino voters and came in last every time, except in 1994. *Id.* Twelve Latinos ran and lost in city council and mayoral elections from 1972-1992 -- all but two placed last. *Id.*

The long losing streak of Latino candidates ended in 1994, after the District Court postponed a July 1994 trial date, in part because "an informed ruling in this matter requires a review of the results produced by the upcoming Santa Maria election in November 1994." *Id.* at 5a. The first two Latinos in the town's history were elected to the city council. Plaintiffs planned to submit evidence at trial demonstrating that special circumstances surrounded the election -- unprecedented crossover voting, endorsements, financial contributions, and press coverage of the lawsuit -- that made it unrepresentative of the usual effect of the at-large election system on Latino voters' opportunity to elect candidates of choice. Id. at 5a-6a. The District Court dismissed the lawsuit as moot, because of the 1994 election. The District Court rejected Plaintiffs' factual showing of special circumstances for failure to uncover direct evidence that voters or politicians acted

with intent to thwart the lawsuit. *Id.* at 21a. In addition, the District Court granted summary judgment for defendants, holding that the first time election of Latino candidates in 1994, when tallied with the election and re-election of a Latino-preferred Anglo candidate, added up to equal opportunity to participate in the political process for Santa Maria's Latino voters. *Id.* at 18a.

REASONS WHY THE WRIT SHOULD BE DENIED

A. THE POSTURE OF THE CASE IS INTERLOCUTORY, AND THE LEGAL ISSUES ARE INTERTWINED WITH COMPLEX AND DISPUTED FACTS.

Santa Maria's Petition overstates the holding and the effect of the Panel's opinion. The judgment does not dispose of the case on the merits of Plaintiffs' claims. Therefore, regardless of the outcome of this Petition, the case must still go to trial.

The facts are complex, and many remain unresolved. The Ninth Circuit held that Plaintiffs have raised triable issues of fact as to whether Anglo bloc voting usually defeats the choice of the Latino electorate. The *Ruiz* opinion generally does not limit what evidence the District Court may consider, and compels no particular conclusion at trial.[2]

Among the material factual issues presented for resolution at trial will be those regarding candidate preference in the 1988 and 1992 elections (Resp. App. 10a-15a), the unprecedented Anglo political and financial support for Latino candidates in 1994 (Resp.

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[2] The single evidentiary limitation imposed by the Appellate Court is its disallowance of arguments disparaging the qualifications of minority candidates, in response to Defendants' assertion that Latino candidates prior to 1994 "were weak candidates who would have lost even if they were white." *Ruiz,* Pet. App. 25a.

App.3a-4a, 16a-26a), the unprecedented Anglo crossover voting for those candidates in 1994 (Resp. App.17a-19a), the highly polarized voting behavior on a proposition appearing on the 1994 ballot (Resp. App.35a-36a), and whether multivariate analysis accurately estimates voting behavior. (Resp. App. 2a-3a).

Indeed, the Petition's Statement of Facts includes a number of disputed facts and omits many others that were undisputed and central to the Ninth Circuit's reading of the case below. See, *infra*, pp. 2-4.

One example of Petitioner's factually imprecise rendition of key issues is the following statement concerning the composition of the city council: "At least three of the four elected members of the Council at that time [1994] were Hispanic preferences: Maldonado, Centeno, and the Mayor, four if Miyoshi is counted." Petition at p. 7. First, if Petitioner is going to include the Mayor in the equation, then the correct total number is five, not four. *Ruiz*, Pet. App. at 2a. Second, the appended phrase "four if Miyoshi is counted " [as a Hispanic preference] is a non-sequitur, since Miyoshi was neither first nor second choice of Hispanics when he was elected, and his seat was not up for election at all in 1994. *Ruiz*, Pet. App. 28a-29a. Petitioners' statement could lead the unwary reader to believe that four of the four city council members were Hispanic preferences, when in fact the evidence shows no more than is set forth in the *Ruiz* opinion, i.e., the first and only Hispanic council members were Maldonado and Centeno – Hispanic-preferred candidates elected in 1994. *Ruiz*, Pet. App. p. 5a; Resp. App. pp 14-15. Remarkably, to establish the mayor as a Hispanic preference in 1994, Petitioner cites to *Ruiz*, Pet. App. 5a, n.8, which specifically notes that "[t]he record does not contain...a statistical report of the Hispanic and non-Hispanic voting percentages for that election," and to *Ruiz*, Pet. App. 28a-29a, which confirms that no such evidence is in the record.

The two legal issues framed by Petitioner are intricately intertwined with unresolved factual circumstances. Neither are appropriate for review by Certiorari prior to resolution below.

B. THE CIRCUIT OPINION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OF THE UNITED STATES COURTS OF APPEALS.

The *Ruiz* opinion is entirely consistent with this Court's precedents and with the views of the Circuits that have addressed the issues raised by Petitioner.

Much of Petitioners' argument is an attempt to pinpoint conflict among cases within the Ninth Circuit. The resolution of intra-Circuit conflict is the purpose of *en banc* review, which was denied by the Ninth Circuit in this case when not a single circuit judge called for a vote to rehear the matter *en banc.* Order, February 23, 1999, Pet. App. 36a-37a). Intra-Circuit conflict is not a ground for this Court's grant of Certiorari.[3]

Both of the challenged holdings simply reverse the preclusive and fatal effect of the District Court's restricted view of the evidence, and remand to allow the evidence to be fully considered

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[3] All of the Ninth Circuit decisions are consistent with the Ruiz opinion, none present holdings contrary to either holding challenged by the Petition. Prior to *Ruiz*, the Ninth Circuit had not addressed the weight to be given the victories of minority-preferred Anglo candidates as compared to the defeat of minority-preferred minority candidates. The sole Ninth Circuit case raising the doctrine of special circumstances, *Valladolid v. City of National City,* 976 F.2d 1293, 1298(9th Cir. 1992) did not require evidence of intentional discrimination as a threshold matter.

consistent with the purposes of the Voting Rights Act, 42 U.S.C. §1973. Neither of the holdings is dispositive of Plaintiffs' claims.

1. Part IV. B. of the Opinion is Consistent With Existing Law, and Provides Appropriate Instructions to Guide the Trial Court in its Analysis of Racially Polarized Voting.

The Petition seeks to delete Part IV. B. of the *Ruiz* opinion which reversed the District Court's dismissal because it was improperly based on a mechanical headcount of Latino-preferred candidates in multi-seat, multi-vote elections. In such an election, Latinos may cast only one vote for the sole Latino candidate, and must either give their vote to an Anglo candidate or withhold it entirely. *Ruiz*, Pet. App. p. 18a. The opinion instructs the District Court that the Anglo candidate (Urbanske) may be considered a minority-preferred candidate. *Ruiz,* Pet. App. 11a-13a, 18a. However, the Opinion further instructs that the repeated and consistent defeat of minority-preferred Latino candidates is more probative of racial bloc voting in multi-seat races. *Ruiz*, Pet. App. 18a-19a. Section IV. B. also instructs the District Court to consider the usual electoral fate of Latino candidates -- who regularly came in last prior to 1994, and whose Anglo support declined from a high of 15.7% in 1988 to 4.6% in 1992. *Ruiz,* Pet. App. at 3a-4a, 18a-19a, 28a. The *Ruiz* Court reasoned:

> "To hold otherwise would doom any Section 2 claim in which white candidates, acceptable to minorities and non-minorities alike, are regularly elected but in which minority candidates, preferred by minorities but unfavored by whites, are consistently defeated. Our rule furthers the Voting Rights Act's goal of protecting the minority's equal opportunity to 'elect its candidate of choice on an equal basis with other voters.' *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993)."

Ruiz, Pet. App. at 17a.

The *Ruiz* instructions are consistent with existing Supreme Court law, which requires "a searching practical evaluation of the past and present reality" with a " functional view of the political process." *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986)(citing S.Rep. No. 97-417, at 30 (1982)). The opinion's rejection of the District Court's "simple mathematical approach – counting the number of successful Hispanic-preferred candidates divided by the number of elections – in its *Gingles* prong three analysis" is consistent with this Court's counsel against the mechanical application of the *Gingles* factors. *Voinovich v. Quilter*, 507 U. S. at 158.

Moreover, this Court's admonition against racial stereotyping that drives the process of race-based gerrymandering in no way hampers the District Court's ability, indeed duty, to determine whether racially polarized voting has rendered the "ability of minority voters to elect their chosen representatives . . . inferior to that of white voters." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993), citing *Gingles*, 478 U.S. at 49, n.15.

The law among the Circuits is also consistent with the *Ruiz* opinion on this issue. A number of Circuit opinions reflect appraisals of widely differing electoral facts involving minority-preferred Anglo candidates. The Circuits that evaluate elections in which the Anglo candidates are running against each other, or running for multiple seats in elections presenting only one minority candidate, uniformly recognize that racially contested elections are more probative of the presence of Anglo bloc voting. *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 988, n. 8 (1st Cir. 1995); *NAACP v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1018 (2d Cir. 1995); *Jenkins v. Red Clay Consol. Sch. Dist.*, 4 F.3d 1103, 1128 (3d Cir. 1993); *Lewis v. Alamance County*, 99 F.3d 600, 610, n.8 (4th Cir. 1996); *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993); *Clark v. City of Cincinnati*, 40 F.3d 807, 812

(6th Cir. 1994); *Nipper v. Smith,* 39 F. 3d 1494, 1540 (11th Cir. 1994).[4]

The Tenth Circuit does not explicitly give less weight to non-racially contested elections, but its approach to this question is consistent with the *Ruiz* opinion. The Tenth Circuit cautions that although Anglo versus Anglo elections may be relevant to the presence of racially polarized voting, such evidence is it useful only when accompanied by anecdotal evidence to enable the court to make a "practical evaluation of the extent to which any particular white candidate was, as a realistic matter, the minority voters' representative of choice." *Sanchez v. State of Colorado,* 97 F.3d 1303, 1321 (10th Cir. 1996), citing *Jenkins v. Red Clay Consol. Sch. Dist.,* 4 F.3d at 1129. Implicitly then, the Tenth Circuit agrees that non-racially contested elections may not be as probative to the *Gingles* third prong, and most certainly rejects the tallying approach applied by the District Court in this case.

Petitioner erroneously argues that the opinion below conflicts with Sixth Circuit law. First, Petitioner reaches to distinguish *Clarke v. Cincinnati,* 40 F.3d 807, upon which the opinion below relies, as involving a "complex proportional representation election system not remotely like Santa Maria's system." Petition at p. 15. However, Plaintiffs in *Clark* challenged exactly the same system challenged here, *i.e.*, multiple vacant seats filled at each election by voters who may cast up to the same number of votes as there are vacant seats, with the top vote-getters winning the election in a system with no district or ward residency requirements. *Clarke*

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[4] Although the 8th Circuit has not addressed the question directly, it reviewed only racially contested elections in *Harvell v. Blytheville School Dist., #5,* 71 F.3d 1382 (8th Cir. 1995), over the dissenting view that given the success of African-American candidates, non-racially contested elections should have been examined as well. *Id.* at 1393, n. 2 (Loken, J., dissenting).

v. Cincinnati, 40 F.3d at 809-810. The only difference is that nine council seats were filled at a time in Cincinnati, and only two at a time are filled in Santa Maria. *Id.*

The recent Sixth Circuit case, *Cousin v. Sundquist*, 145 F.3d 818, 823-826 (6th Cir. 1998), continues the Sixth Circuit practice of examining all elections, whether or not racially contested. Indeed, at least one lower court in the Sixth Circuit has interpreted *Cousin* to "implicitly recognize[] that races involving only white candidates, while relevant, are not typically as relevant as black-white elections." *Rural West Tennessee African American Affairs Council, Inc., v. Sundquist*, 29 F. Supp.2d 448, 456 (W.D. Tenn., 1998).

> "In *Cousin*, the Sixth Circuit made it clear that it does not expect all white-white elections to be relevant, but where the record indicates they are, the district court must consider them. Therefore, while a court in this circuit must consider white-white elections, it should place primary reliance on the elections involving a minority candidate." *Id.*

Finally, even Judge Wallace's dissent from this portion of the opinion recognizes that the success of Hispanic-preferred Anglo candidate Urbanske is less probative of voter polarization, because Urbanske was the first choice of Anglos in Santa Maria. "I would determine the level of polarization by considering the success or failure of minority-preferred candidates -- regardless of race -- *who are not preferred by the majority.*" *Ruiz*, Pet. App. 31a (Wallace, J., dissenting) (emphasis added).

The *Ruiz* opinion on this issue is legally sound, and provides guidance to the lower court that is warranted by the facts in this case. Its underlying premise, that candidacies supported by both groups in multi-seat, multi-vote elections are relevant -- but not as illuminating of the effects of Anglo bloc voting as are polarized candidacies -- is consistent with existing law.

2. The Ninth Circuit's Reversal of the District Court's Erroneous Rejection of Plaintiffs' Evidence of Special Circumstances is Consistent With Existing Law.

Part IV. D. of the *Ruiz* opinion reversed the District Court's requirement that Plaintiffs submit proof of voters' or political leaders' intent to thwart the pending lawsuit as a condition precedent to demonstrating that the 1994 election was characterized by "special circumstances." The reversal is not dispositive of Plaintiffs' claims.

The District Court's ruling precluded it from considering the abundant evidence of unusual endorsements, financial contributions, unprecedented Anglo crossover voting, and newspaper coverage of the lawsuit's relationship to the election. *Ruiz,* Pet. App. 5a-6a. Because the District Court's ruling erected a barrier that was inconsistent with the overall purpose of the Voting Rights Act, with the elimination of the intent requirement in the 1982 amendments to that Act, and with Supreme Court discussions of "special circumstances," *Gingles,* 478 U.S. at 51, 57, 76, it was reversed by the Ninth Circuit with instructions to consider all the relevant evidence presented. The appellate remand allows Plaintiffs to go forward with proof that the 1994 election was atypical and therefore not probative of the usual effect of at-large elections on Latino voters' ability to participate in the political process.

The doctrine of "special circumstances" originated from this Court's concern that isolated minority successes, particularly those borne out of elections characterized by unusual circumstances, should negate a usual pattern of Anglo bloc voting in the third prong of a *Gingles* vote dilution inquiry. *Gingles,* 478 U.S. at 57, 76. The list of examples of "special circumstances" included the pendency of litigation, but did not hold that Plaintiffs must prove

discriminatory or even self-preservationist intent on the part of the defendants, politicians, or voters.

The *Ruiz* view of "special circumstances" is consistent with the treatment of the doctrine in the other Circuits. Although other Circuits have noted the relevance of evidence suggesting that political leaders sought to manipulate a lawsuit, none have precluded a claim of "special circumstances" for failure to prove such intent, and one Circuit specifically finds intent irrelevant. *Collins v. City of Norfolk*, 816 F.2d 932, 938 (4th Cir. 1987).

Most of the cases cited in the Petition do not directly address the "special circumstances" doctrine, but merely reflect a struggle in a number of Circuits to grapple with the role of racial intent and causation in applying the "effects" test under Section 2. Those Circuits have adopted a view that proof of vote dilution can be rebutted with proof of non-racial reasons for minority losses. *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d at 980-984; *LULAC v. Clements*, 999 F.2d at 850-863; *Nipper v. Smith*, 39 F.3d at 1515-1526. None requires Plaintiffs to prove racial animus on the part of the voters or the jurisdiction, but simply allow Defendants to introduce evidence to rebut the inference of racial bias created by the presence of racially polarized voting. *Uno*, 72 F. 3d at 983; *Nipper*, 39 F. 3d at 1524; *LULAC*, 999 F. 3d at 860. *LULAC* allowed defendants to introduce evidence of partisan affiliation, without taking a position on burden allocation, but noted that requiring affirmative proof of white voters' racial animus would make Section 2 litigation difficult and expensive, and would "facilitate the use of thinly-veiled proxies by permitting, for example, evidence that a minority candidate was regarded as 'unqualified' or 'corrupt' to defeat a claim that white voters' refusal to support him was based on race or ethnicity." *Id.* None of the cases support the preclusive rule of law that the District Court imposed.

Judge Wallace's dissent, like the majority opinion, would consider the evidence of unusual cross-over voting, endorsements,

and financial backing as part of the *Gingles* analysis, whether or not proof of racial animus or intent to thwart the lawsuit is adduced. *Ruiz*, Pet. App. 31a-32a. (Wallace, J., dissenting). Judge Wallace's disagreement with the need for the guidance provided in Section IV. D. of the Panel opinion does not provide a basis under Supreme Court Rule 10 for review by Certiorari.

It is the District Court's preclusion of Plaintiffs' evidence that was maverick, not the Ninth Circuit's remand for trial. The Appellate Court Opinion allows Plaintiffs to proceed at trial unhampered by the impossibly high threshold requirement of proving that voters or political leaders intended to thwart the lawsuit by voting for, endorsing, or contributing to Latino candidates. The opinion is consistent with this Court's rulings and with the law of the Circuits. Plaintiffs should be allowed to proceed to trial with evidence relevant to whether the 1994 election was characterized by special circumstances such that it is not representative of the typical effect of at-large elections on Santa Maria's Latino electorate.

CONCLUSION

Certiorari prior to trial should be reserved for cases in which a District Court would be hampered by conflicting Supreme Court and Circuit law on an important issue necessary to full adjudication. This case is quite the opposite. The Ninth Circuit remands this case with instructions that will aid the trial court in its weighing of the evidence. The Petition does not meet the standards set forth in Supreme Court Rule 10. Therefore, the Petition for Writ of Certiorari should be denied, and the case should proceed toward a long-awaited trial on the merits.

Dated: May 13, 1999
Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

	)	No. CV-92-4879-JMI (SHx)
ESPERANZA RUIZ, *et al.*,	)	**PLAINTIFFS' SEPARATE STATEMENT OF GENUINE ISSUES OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
Plaintiffs,	)	
v.	)	
CITY OF SANTA MARIA, CALIFORNIA, *et al.*,	)	
	)	
Defendants.	)	Hearing Date: January 29, 1996
	)	Courtroom: The Honorable
	)	Judge James M. Ideman

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I. GENUINE ISSUES OF MATERIAL FACT

Pursuant to Local Rule 7.14.2 Plaintiffs submit the following Statement of Genuine Issues of Material Facts which preclude summary judgment in favor of Defendants.

1. Whether Anglo bloc voting usually defeats the candidates of choice of the Hispanic electorate?

Plaintiffs maintain that non-Hispanics have historically been the overwhelming majority of Santa Maria's eligible voters, and that their bloc voting against Hispanic candidates has prevented any Hispanic candidate from ever sitting on the council until the 1994 election. Twice prior to 1994, and only in the context of a two vote election where only one Hispanic was running, did the majority choice -- Thomas Urbanske, an Anglo candidate -- coincide with Hispanic support. Every Hispanic candidate from 1988 to 1994 had been the preference of Hispanic voters, and, until 1994, had come in last among non-Hispanic voters and last overall. See Richard Engstrom August 8, 1995 Report 16-17, Exhibit 1 to Declaration of Richard Engstrom in Support of Plaintiffs Opposition to Defendants' Motion for Summary Judgment (hereinafter "Engstrom Report") The two Hispanics that currently sit on the City Council were elected in 1994, a post-litigation election characterized by special circumstances about which there is much dispute by the parties, and their election does not cure the system of its discriminatory effects. Engstrom Report at 24.

2. Whether under the facts of this case, multivariate analysis accurately estimates voting behavior?

Plaintiffs dispute this assertion because the African American and Asian populations are so small and dispersed in Santa Maria that the faulty methodology used to measure their preferences in the multivariate analysis has led to absurd and unreliable results See Engstrom Report 8-15; Richard Engstrom

"Supplemental Report on Group Divisions in Santa Maria, California" 2-10, Exhibit CC to Declaration of Irma Rodriguez (hereinafter "Rodriguez Dec.") in Support of Plaintiffs Opposition to Defendants Motion for Summary Judgment (hereinafter "Engstrom Supplemental Report").

3. Whether the absence of non-Hispanic Bloc Voting in the 1994 City Council election cures Santa Maria's at-large election system of its dilutive effects?

Plaintiffs contend that given the consistent pattern of vote dilution in the 1988 to 1992 elections and the unique circumstances surrounding the 1994 elections, the results of that election, including the absence of non-Hispanic bloc voting, did not cleanse the at-large system of its dilutive effect on Hispanic votes. See Engstrom Report.

4. Whether the 1994 elections in Santa Maria were surrounded by special, unique circumstances that made the results of the election unrepresentative of Hispanic voters' ability to elect?

Plaintiffs contend that the 1994 election should be disregarded in determining whether racially polarized voting exists in Santa Maria. The circumstances surrounding the 1994 election were a significant departure from any previous election. The Hispanics who got elected received endorsements from influential non-Hispanic political leaders who had never supported a Hispanic candidate in the past; they received an unprecedented amount of financial support from non-Hispanics; they were competing against a "weak" incumbent; Maldonado set a record for the amount of money spent on a council race and outspent opponents by a three to one margin; and Maldonado made statements to the press regarding the lawsuit. Every one of these facts -- individually and collectively -- support a finding that

"special circumstances" were present in the 1994 elections. See #15 below and accompanying citations.

5. Whether by 1998, Hispanic population, voting age citizens and registrants will have increased Hispanic ability to elect at-large such that the discriminatory dilutive effects of the at-large system will be cured in the 1988 at-large election?

This factual issue need only be decided if the Court determines that the presence of two Hispanics on the city council deprives Plaintiffs of the right to a remedy in 1996, because of the chance that district elections will result in overrepresentation. i.e., more Hispanics on the council than the proportion of Hispanic voters. Plaintiffs argue that the correct legal and factual inquiry is whether the election system itself is discriminatory and dilutive, entitling Plaintiffs to a remedy, not whether the first-time election of two Hispanics constitutes proportional representation, and deprives Plaintiffs of a remedy. See Plaintiffs Opposition to Defendants Motion for Summary Judgment, Section IV.E. However, should this court determine this legal issue in favor of Defendants, only then may the factual issue of the projected size of the Hispanic electorate be relevant to whether the at-large system deprives Plaintiffs of an equal opportunity to elect candidates of their choice.

Plaintiffs dispute Defendants' use of population projections and estimations instead of official U.S. Census data, both as legal error, inaccurate, internally contradictory, inconsistent and unbelievable data. See Estrada Report in Response to Peter Morrison's Memorandum on 1995 Population Update for the City of Santa Maria, Exhibit 1 to Declaration of Leo Estrada in Support of Plaintiffs Opposition to Defendants Motion for Summary Judgement (hereinafter "Estrada Report")

6. Whether Plaintiffs are able to prove the first Thornburg prong at the time of each election analyzed by polarization experts in this case?

This factual issue need only be addressed should the Court rule favorably on Defendants' erroneous legal position that Plaintiffs must factually demonstrate an ability to elect in their proposed Thornburg district in 1988, 1990, 1992, 1994. If the Court thus rules, then there will be material, disputed issues of fact as to the following: the accuracy of Census data; the ability to draw a Thornburg district using 1980 Census data; the accuracy of Dr. Morrison's population projections; the use of Plaintiffs' census citizenship figures; the appropriateness of Plaintiffs' methodology for drawing the districts, i.e., whether traditional redistricting principles were violated or subordinated to race-conscious considerations; the appropriateness of Defendants' methodology for re-running prior elections in Plaintiffs' Thornburg district. See Morrison Report; Estrada Report; Dave Ely 1980 District, Exhibit DD to Rodriguez Declaration; Dave Ely August 8, 1995 Report, Exhibit EE to Rodriguez Declaration; Engstrom Supplemental Report.

II. DEPOSITION EXCERPTS DO NOT CONSTITUTE "IRREFUTABLE TESTIMONIAL ADMISSIONS"

Defendants attach deposition excerpts and, in one instance, prior testimony[1] from an unrelated case in another

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[1] Plaintiffs object to the admission of prior trial testimony (cross examination) of Plaintiffs' expert Robert Bob Brischetto from Aldasoro v. Kennerson, Case No. 91-1410B. Although Rule 56(c) authorizes the consideration of a broad range of materials in a summary judgement decision, material that is not admissible or otherwise usable at trial cannot be considered on a motion for summary judgement. *Association for Reduction of Violence v. Hall*, 734 F.2d 63 (1st Cir. 1984)(material which had been held privileged

district, to their Statement of Uncontroverted Facts and Admissions Adverse to Plaintiffs in Support of Santa Maria's Response to October 24, 1995 Order without any legal citation whatsoever. Defendants characterize those statements as "testimonial admissions," [Defs. Facts at p. 3] that are "not refutable and cannot be refuted by any evidence plaintiffs may submit." [Defs. Facts at p. 20]

Defendants are wrong. Basic fundamentals of testimonial and evidentiary presentation include the right of parties to refute, amend, rehabilitate, explain, elucidate any testimony, even to the point of treating their own witnesses as hostile if necessary, within the bounds of court discretion, of course. Indeed, this is the purpose of redirect examination at trial. In the case of deposition testimony, Defendants pull out a few selected statements, including only the responses they believe scored them a few "points," and attempt to elevate those bits and pieces to the status of irrefutable admissions, implying a binding effect on Plaintiffs. Plaintiffs are entitled to refute, dispute, amend, explain any deposition testimony, and to the extent it is necessary and relevant, have done so below.

III. PLAINTIFFS DISPUTE MANY OF THE FACTS DEFENDANTS ERRONEOUSLY CLAIM ARE "UNDISPUTED."

Plaintiffs dispute the accuracy of the following "Undisputed Facts" In Support of Santa Maria's Response to October 27, 1995 Order.

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from discovery was improperly considered in the summary judgement decision) The use of Dr. Brischetto's testimony from a prior case is excludable hearsay which under Federal Rule of Evidence 804(b)(1) is only admissible where the witness is unavailable as a witness. Bob Brischetto remains available to testify in the current litigation, and in fact was deposed by Defendants.

1. Defendants claim that the at-large electoral system in Santa Maria "means that every voter has a say in the election of every Council member." (Statement of Uncontroverted Facts and Admissions Adverse to Plaintiffs in Support of Santa Maria's Response to October 27, 1994 Order, #1, [hereinafter "Defs. Facts"].)

Plaintiffs contend that Hispanic votes are diluted by the operation of the at-large electoral system, so Hispanics do not "have a say" in the election of every council member, in that they do not have an equal opportunity to elect candidates of their choice, due to the dilutive at-large system of electing city council members. See Engstrom Report.

2. Defendants claim that "Santa Maria demographer Dr. Peter Morrison believes that by 1995 Hispanics were a majority of Santa Maria's population and that the Hispanic share of Santa Maria's total population will continue to rise in the future." [Defs. Facts #7].

Plaintiffs' dispute Dr. Morrison's use of population projections and estimations in place of official U.S. Census data. Moreover, Dr. Morrison's data is inaccurate, internally contradictory, inconsistent and unbelievable. See Estrada Report. Plaintiffs' expert, Leo Estrada, contends:

- that Dr. Morrison's conclusions are not adequately supported by his sparse underlying data;
- that considerable caution must be taken when applying Department of Finance data to relatively small geographic units such as Santa Maria;
- that population estimates can be unstable, as evidenced by the Department of Finance's recognition that its 1993 statewide estimates were

too high, and its subsequent decision to lower the overall growth curve;

- that analysts at the Department of Finance have warned its data users that if their estimates of net migration continue to decline, another downward adjustment of overall state estimates may be necessary before the end of this decade;

- that Dr. Morrison has failed to consider whether a 1.2 percent annual growth rate for Hispanics is consistent with other available data;

- that Dr. Morrison's application of the 1980 Hispanic growth rate to the 1990's fails to consider that the 1990 Census did a better job of enumerating Hispanics that did the 1980 Census, and thus a portion of the "growth" between 1980 and 1990 could be due to better enumeration;

- that Dr. Morrison incorrectly generalizes based on statewide and national data to draw specific inferences about Santa Maria demography;

- that Dr. Morrison violates sound demographic principles by using voter registration as an indicator of population growth;

- that Dr. Morrison's use of new housing as a proxy for population growth fails to considers person-per-household patterns, tenancy rates, births and newcomers that are simply absorbed into available housing, and other available data;

See Estrada Report.

Plaintiffs further contend that Dr. Morrison's data mathematically and logically makes no sense. Dr. Morrison relies on data from the Department of Finance that estimate that the 1995 population of Santa Maria is 68,900. If Dr. Morrison is to be believed, 51.7 percent, or 35,621 are Hispanic. This represents a Hispanic population five-year growth of 7,607. But the entire population only grew by 7,616 in those same five years. To accept Dr. Morrison's estimated projections, then, one would have to believe that all but 9 of the net 7616 persons that were added to Santa Maria's population are Hispanic.

Incredibly, Dr. Morrison further opines, based on the location of new housing alone, that a full 96 percent of the population growth occurred outside of Plaintiffs' Thornburg district. Dr. Morrison then would have this court believe that 99.9 percent of the population growth is Hispanic, but that 96% of the overwhelmingly Hispanic growth occurred in predominantly Anglo neighborhoods. See Morrison Report, Appendix 2. Dr. Morrison offers no explanation for this phenomenon, which on its face makes no sense.

3. Defendants claim that the Hispanic registration rate in Santa Maria "likely will continue to rise in the future due to increasing Hispanic population, naturalization, and implementation of the federal motor voter law in California which registers people at the time they obtain or renew their drivers' licenses. [Defs. Facts #8]

Plaintiffs object to the characterization of this statement as an undisputed "fact." Rather, it is mere speculation. This prediction is unsupportable because it is based on faulty data, and especially questionable INS data. See February 7, 1994 Leo Estrada Report, Exhibit FF to Rodriguez Dec.; See also Leo Estrada March 17, 1994 Supplemental Report No. 2 (Revised), Exhibit GG to Rodriguez Dec.

Moreover, Dr. Morrison has not performed the requisite analysis to determine the number of Hispanic eligible voters for 1995, let alone do the calculations that would enable him to project into the future. See October 20, 1995 Deposition Testimony of Peter Morrison 16:3 -- 25:12, Exhibit Z to Rodriguez Dec. (hereinafter "Morrison Deposition")

4. Defendants claim that "In three of the last four City Council elections, the first preference of Hispanic voters was elected: Tom Urbanske in 1988 and 1992, and Abel Maldonado in 1994." [Defs. Facts #10]

Plaintiffs do not dispute that Abel Maldonado received the highest point estimate among Hispanic votes in 1994, and that he was elected. However, Plaintiffs do dispute whether Urbanske was the first preferred candidate of Hispanic voters in 1988 and 1992 and contend that racially polarized voting is present in Santa Maria. Defendants' expert, Dr. Klein, admits that in 1988, the estimates of Hispanic support for Urbanske and the Hispanic candidate Martel are not statistically significant from each other. See April 8, 1994 Deposition Testimony of Stephen Klein 118:22 -- 122:12, Exhibit AA to Rodriguez Dec. (hereinafter "Klein Deposition") Dr. Klein further admits that two-vote elections where one minority is running can be racially polarized, notwithstanding the fact that minority voters may cast one vote for the minority candidate and the other for an Anglo candidate. See Klein Deposition 27:13-23. Thus, the election of Urbanske does not negate a finding of racially polarized voting, because only one of the two seats was racially contested, and Hispanics could only cast one of their votes for a Hispanic candidate. The analysis of the votes cast can identify the two preferences of the Hispanic community, but cannot measure the intensity of the preference. See Engstrom Report.

Moreover, the difference between the estimate for first preference and second preference among the Hispanic electorate in 1988 and 1992 is negligible in the bivariate analysis (a

difference of 3.9% in 1988 and 2.5% in 1992) The analysis of a two-vote election where two seats are vacant can identify the two preferences of the Hispanic electorate, but cannot measure the intensity of the preference. See Engstrom Report.

5. Defendants claim that "Hispanics vetoed the Anglo first preference [in 1994], Anglo encumbent Bob Orach who received only minimal support from Hispanics. [Defs. Facts #11]

Plaintiffs dispute this contention, and its characterization as an undisputed fact. Hispanics did not "veto" the choice of the Anglo community in the manner in which Thornburg's third prong requires proof that a majority voting bloc veto the choice of the minority community. In fact, given the size of the Hispanic population in Santa Maria, no one has ever claimed that Hispanics are or ever were a majority of the community, the eligible voters, registrants, or turnout in any election in Santa Maria. Conversely, no one has ever claimed that non-Hispanics, or Anglos, are or ever were a minority of the community, the eligible voters, registrants, or turnout in any election in Santa Maria. Plaintiffs also dispute this contention because it purports to identify the "anglo" preference, based on faulty multivariate polarization analysis. Engstrom Report.

6. Defendants contend that "Hispanics also elected their preferred candidate for Mayor in 1994, Roger Bunch." [Defs. Facts #11]

Plaintiffs contend this fact is not material, as the 1994 mayoral election was not racially contested.

7. Defendants contend that in 1992, Hispanics vetoed the Anglo second preference, and thus, "both Anglos and Hispanics elected their first and third preferences." .[Defs. Facts #12]

Plaintiffs dispute this contention, and its characterization as an undisputed fact. There was no third "choice" elected in any election, as only two seats were open in each election. [Defs. Facts #3] Hispanics did not "veto" the choice of the Anglo community in the manner in which Thornburg's third prong requires proof that a majority voting bloc veto the choice of the minority community. At no time has any contention been made that Hispanics are or ever were a majority of the community, the eligible voters, registrants, or turnout in any election in Santa Maria. Conversely, no one has ever claimed that non-Hispanics, or Anglos, are or ever were a minority of the community, the eligible voters, registrants, or turnout in any election in Santa Maria. Plaintiffs also dispute this contention because it purports to identify the "Anglo" preference, based on faulty multivariate polarization analysis. See Engstrom Report.

8. Defendants contend that in 1992, the Hispanic point estimates for Castillo and Miyoshi were so close that they received essentially equal support. [Defs. Facts #13]

Plaintiffs contend that to the extent such assertion of fact implies that the multivariate analysis was actually able to measure the voting behavior of Anglos, Hispanics, Blacks and Asians, it is disputed by Plaintiffs. See Engstrom Report. Both Dr. Engstrom's Report and his deposition support Plaintiffs' contention that Castillo was the Hispanic candidate of choice. See Engstrom Report; September 13, 1995 Deposition Testimony of Richard Engstrom pp. 99-100, Exhibit HH to Rodriguez Dec. (hereinafter "Engstrom Deposition") Moreover, Defendants' expert, Dr. Klein, admits that in 1988, the estimates of Hispanic support for Urbanske and the Hispanic candidate Martel are not statistically significant from each other. See Klein Deposition 118:22 - 122:12. Thus, to the extent that these point estimates (that are not statistically significant from each other) are used by Defendants to assert that Hispanics elected their second preference in 1992, they must concede then that Martel could have been the first choice of Hispanics in 1988, not Urbanske, and

thus Hispanics did not elect their first choice in 1988. [See Defs. Facts #10, #12, #14, #15, #16, and #17]

9. Defendants contend that in 1988 and 1992 "Hispanic voters preferred an Anglo who won to the sole Hispanic candidate who lost."

Plaintiffs contend that Hispanics, as did all voters, had two votes in each of the prior elections analyzed. And, with the exception of those voters who did not cast their second vote, Hispanics had two preferences - two votes to cast, but only one Hispanic in the race. When the two Hispanic preferences included Thomas Urbanske, an Anglo candidate, that candidate also received overwhelming Anglo support and was elected. When the Hispanic preference was an Hispanic candidate, that candidate received minimal non-Hispanic support[2] and thus every single Hispanic candidate came in last in the field of candidates. See Engstrom Report; Engstrom Deposition at 101.

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[2] In the four racially-polarized elections analyzed by Plaintiffs' expert prior to 1994,, majority non-Hispanic support for Hispanic candidates ranged from a high of 15.7% in 1988 to low of 4.7% in 1992. See Engstrom Report at 16-17. In Thornburg, white support for black candidates ranged from 8% to 50% in primary elections and from 28% to 49% in general elections, a significantly higher range of support for Black candidates than non-Hispanics have shown for Hispanics in Santa Maria. 478 U.S. at 59.

Even Defendant's expert's multivariate analysis estimates that the most cross-over support that any of the Hispanic candidates received was 15% of the Anglo vote. See Klein Report at 9. That candidate, Mr. Martel, would have still come in last in 1988 even if he had received 100% of the Hispanic vote. (Assuming an 80.9 to 19.1 ratio of non-Hispanic to Hispanic voters (See Morrison Report, p. 16 Table 1), Mr. Martel could only have received votes from 31.8% of the voters. (.809 x 15.7% + .191 x 100%)

Defendants' expert admits that two-vote elections where one minority is running can be racially polarized, notwithstanding the fact that minority voters may cast one vote for the minority candidate and the other for an Anglo candidate. See Klein Deposition 27:13-23. Moreover Dr. Klein also admits that in 1988, the estimates of Hispanic support for Urbanske and the Hispanic candidate Martel are not statistically significant from each other. See Klein Deposition 118:22 -- 122:12. Thus, the election of Urbanske does not negate a finding of racially polarized voting, because only one of the two seats was racially contested, and Hispanics could only cast one of their votes for a Hispanic candidate. The analysis of the votes cast can identify the two preferences of the Hispanic community, but cannot measure the intensity of the preference. See Engstrom Report.

10. Defendants contend that of "eight seats elected in the last four City Council elections, Hispanics elected at least four of their preferences, five if Miyoshi is counted." [Defs. Facts #16]

Plaintiffs contend that in each of these elections prior to 1994, the Hispanic preferred candidate who was Hispanic was not elected, and in fact came in last city-wide every time due to Anglo bloc voting in an at-large election. Twice, and only in the context of a two vote election where only one Hispanic was running, did the majority choice -- Thomas Urbanske, an Anglo candidate -- coincide with Hispanic support. See Engstrom Report. Plaintiffs further contend that the 1994 election was characterized by special circumstances. See #15 below and accompanying citations.

11. Defendants contend that "At least three of the four elected members of the Council are Hispanic preferences: Maldonado, Centeno....Bunch, four if Miyoshi is counted." [Defs. Facts #16]

Plaintiffs contend that the election of Bunch is not material, as the 1994 mayoral election was not racially contested.

Plaintiffs further contend that the 1994 election was characterized by special circumstances. See #15 below and accompanying citations. Plaintiffs dispute the characterization of Miyoshi as an Hispanic preference. Both Dr. Engstrom's Report and his deposition support Plaintiffs' contention that Castillo was the Hispanic candidate of choice. See Engstrom Report; Engstrom Deposition at 99-100. Moreover, Defendants' expert, Dr. Klein, admits that in 1988, the estimates of Hispanic support from Urbanske and the Hispanic candidate Martel are not statistically significant from each other. See Klein deposition, p. 118:22 - 122:12. Thus, to the extent that these point estimates (that are not statistically significant from each other) are used by Defendants to assert that Hispanics elected their second preference in 1992, they must concede then that Martel could have been the first choice of Hispanics in 1988, not Urbanske, and thus Hispanics did not elect their first choice in 1988 or 1992. [See Defs. Facts #10, #12, #14, #15, #16, and #17]

Finally, the fact that Maldonado and Centeno currently sit on the council, by itself is not material. What is material is the factual circumstances surrounding the 1994 election in which they ran.

12. Defendants contend that it is undisputed that "Hispanics clearly exercise considerable influence over City Council Elections in Santa Maria." Defendants further refer to Hispanic voters "defeat[ing] Anglo incumbents," and as the "decisive factor in defeating George Hobbs in the 1994 mayoral election."[Defs. Facts #17]

Plaintiffs dispute this factual contention, and contend that the current at-large system of elections is dilutive of Hispanic votes in Santa Maria. See Engstrom Report.
Plaintiffs also dispute this contention's characterization as an undisputed fact. Hispanics did not "veto" the choice of the Anglo community, or "defeat" candidates in the manner in which Thornburg's third prong requires proof that a majority voting bloc

veto the choice of the minority community. Defendants have never claimed, nor could they so claim, that Hispanics are or ever were a majority of the community, the eligible voters, registrants, or turnout in any election in Santa Maria. Conversely, Defendants have never claimed, nor could they so claim, that non-Hispanics, or Anglos, are or ever were a minority of the community, the eligible voters, registrants, or turnout in any election in Santa Maria. Finally, that Bunch defeated Hobbs in 1994 is not material, as the 1994 mayoral election was not racially contested.

13. "Defendants claim that the 1994 election is more probative of Hispanic voting strength and of the likelihood of Hispanic candidates getting elected that earlier elections in view of increased Hispanic population, registration and turnout since 1988, which is likely to increase further in the future." [Defs. Facts #18]

Plaintiffs dispute this fact, and further contend that the 1994 election was characterized by special circumstances. See #15 below and accompanying citations. Plaintiffs have vigorously contested Defendants' population projections and the faulty analyses upon which they are based. See dispute # 3 above, and accompanying citations.

14. Defendants claim that "Social science research indicates that once minorities exceed 50% of a city's population as is true in Santa Maria, there is no advantage to district elections over at-large elections in electing minorities." [Defs. Facts #18]

Plaintiffs dispute this conclusory statement, and object to the submission of prior testimony by Dr. Brischetto in an unrelated case. Plaintiffs further believe the statement to be immaterial, because Defendants have not proven that Hispanics exceed 50% of Santa Maria's population, and Plaintiffs have vigorously contested such assertion and the faulty analyses upon which it is based. See dispute # 3 above, and accompanying citations.

15. Defendants assert as "undisputed" various statements concerning the 1994 election, and the candidates who ran in that election. [Defs. Facts #19]

Most of the "facts," as distinguished from the conclusory statements and opinions, are not disputed by Plaintiffs. Some of those "facts" support Plaintiffs allegation that the 1994 election was characterized by special circumstances. Additional undisputed facts surrounding the 1994 election are:

The Hispanics who were elected in 1994 received endorsements from influential non-Hispanic political leaders who had never supported a Hispanic candidate in the past; they received an unprecedented amount of financial support from non-Hispanics; they were competing against a "weak" incumbent; Maldonado had set a record on the amount of money spent on a council race and outspent opponents by a three to one margin; and Maldonado had made statements to the press regarding the lawsuit. Every one of these facts -- individually and collectively -- support a finding that "special circumstances" were present in the 1994 elections.

In 1994, for the first time in Santa Maria's history, Hispanic candidates were not the least-preferred among non-Hispanic voters. See Engstrom Report. In 1994, Centeno and Maldonado were the second and third preference of non-Hispanic voters, respectively. Centeno received votes from 35.2 percent of the non-Hispanics voters, while 26.1 percent of non-Hispanic voters supported Maldonado. See Engstrom Report at 17. Incumbent Robert Orach was the first preferred candidate among non-Hispanics, receiving 42.2 percent of their votes, but he received only 1.1 percent of votes cast by Hispanics. Id. at 34. Still, Maldonado beat Orach, for the second seat by a mere 84 votes. Id. at 17.

Estimated Divisions in Candidate Preferences
1994 Councilmanic Election

Candidate	% of Non-Hispanics Casting Ballots	% of Hispanics Casting Ballots
Maldonado	26.1	65.4
Centeno	35.2	39.8
Guevara	1.9	31.6
Minami	9.4	22.3
Walker	3.2	10.6
Watson	1.9	4.2
Benedetti	24.2	4.0
Hosepian	5.5	3.1
Hunt	3.6	2.8
Orach	42.2	1.1
Hollister	10.4	-1.2
Chenoweth	11.4	-1.6

See Engstrom Report at p. 34.

The election of Centeno and Maldonado was the result of unprecedented non-Hispanic cross-over voting. See Engstrom Report at 16 - 17. The greatest non-Hispanic voter support any Hispanic candidate had received since the 1988 election was Felix Martel, who had received support from 15.7 percent of non-Hispanic voters -- less than half what Centeno received. In comparison, 1990 councilmanic candidate Gil Guevara only received 8.6 percent of non-Hispanic votes, and 1992 councilmanic candidate Fernando Castillo received 4.7 percent of non-Hispanic votes. In the 1990 mayoral race, Fernando Castillo received 5.1 percent of non-Hispanic votes while Margie Lopez received 6.6 percent. Id.

Non-Hispanic Support for Hispanic Candidates

Year	Candidate	Percentage
1988	Martel	15.7
1990	Guevara	8.6
1990	Lopez	6.6
1990	Castillo	5.1
1992	Castillo	4.7
1994	Maldonado	26.1
1994	Centeno	35.2

A close examination of the candidates and the unusual events surrounding the 1994 election explain this unprecedented non-Hispanic support for Hispanic candidates.

In 1994, Maldonado was twenty-six years old and had never been involved in any civic, political or community organizations in the city of Santa Maria. See July 19, 1995 Deposition Testimony of Abel Maldonado 35-36, Exhibit Q to Rodriguez Dec. (hereinafter "Maldonado Deposition"). He had no experience running for elected office, not even in high school or college. Id. at 10, 14. He "wasn't a good speaker" and attended only three candidate forums. Id. at 42:15 - 43:2. In his own words: "[n]obody knew Abel Maldonado." Id. at 19:7-10. Moreover, none of the persons who worked on Maldonado's campaign had ever worked on a campaign before. Id. at 28-29, 32-33.

Centeno, on the other hand, began the campaign with higher name recognition than almost all other candidates. See July 7, 1995 Deposition Testimony of Curtis Tunnell 23-24, Exhibit R to Rodriguez Dec. (hereinafter "Tunnell Deposition"). This was due, in part, to his status as the City's former Chief of Police. Id. He had served in the police department for 35 years, the last ten as chief. See Defendants' Statement of Undisputed Facts, # 19. He was even identified on the ballot as "former

police chief." See Engstrom Report at 21; July 7, 1995 Deposition Transcript of Trent Beneditti 43-44, Exhibit W to Rodriguez Dec. (hereinafter "Beneditti Deposition") Centeno had never run for public office before. See July 20, 1995 Deposition Testimony of Joseph Centeno 24, Exhibit S to Rodriguez Dec. (hereinafter "Centeno Deposition"). Both Maldonado and Centeno announced at a public forum that they opposed district elections. See Maldonado Deposition 43-44; Centeno Deposition 55.

Orach was the only incumbent seeking re-election to the city council. Orach was originally a mayoral candidate, but changed his mind when long-time mayor George Hobbs announced his intention to seek re-election. It was the consensus of the lay witnesses during their deposition testimony -- and Defendants admit as uncontested fact #21 -- that Orach's last-minute switch to council candidate hurt him at the polls, greatly lessening the advantage of his incumbency. Still, he lost to Maldonado by only 84 votes.

In spite of his tremendous inexperience, Maldonado had unprecedented political endorsements. In 1994, Curtis Tunnell, a long-term city councilman, endorsed Maldonado. See Tunnell Deposition 5. Tunnell agreed to endorse Maldonado after meeting him two or three times in social settings. Id. at 7-8. Tunnell also encouraged Centeno to run and endorsed his election. Id. at 5, 16. Tunnell had never endorsed or encouraged a Hispanic candidate prior to 1994. Id. at 8-9 Casey Kyle, a former mayor, was on Centeno's campaign committee. See Centeno Deposition 29-30.

Additionally, Harrell Fletcher, a former county supervisor and influential political leader, endorsed Maldonado for the city council. July 19, 1995 Deposition Testimony of Harrell Fletcher 8, Exhibit T to Rodriguez Dec. (hereinafter "Fletcher Deposition"). He introduced Maldonado to influential political and business leaders and offered him advice on all aspects of his

campaign. Id. at 8-12. Fletcher also endorsed Centeno for the city council. Id. at 21 Prior to 1994, Fletcher had never endorsed a Hispanic candidate. Id. at 41-42.

Prior to 1994, George Hobbs, the city's long-time mayor, had never endorsed a Hispanic candidate. July 7, 1995 Hobbs Deposition 70-72. In 1994, he officially endorsed Maldonado after meeting him twice and informally endorsed Centeno. Id. at 61-68, 82-84 George Hobbs' endorsement -- important because he had been mayor for 34 years -- signalled to his supporters that Maldonado was a candidate who was acceptable to him. October 4, 1995 Zacarias Deposition 28, 51, Exhibit U to Rodriguez Dec. (hereinafter "104/95 Zacarias Deposition"); Fletcher Deposition 14-15. George Hobbs indicated in his campaign letter that he endorsed Maldonado. See Exhibit F to Rodriguez Dec. (Hobbs campaign material) Receiving the endorsements of both Hobbs and Tunnell was a coup for the inexperienced Maldonado, and an unusual event. See June 26, 1995 Deposition Testimony of Thomas Urbanske 14, Exhibit L to Rodriguez Dec. According to Harrell Fletcher: "I thought it was kind of nice that he was endorsed by both George Hobbs and Curtis Tunnell who hated each other." Fletcher Deposition 15. He also thought it was important to "have both sides of the political ring in Santa Maria supporting a candidate." Id. at 16. Maldonado prominently noted in his campaign literature and advertisements that he was endorsed by Tunnell, Fletcher, and Hobbs. See Exhibit G to Rodriguez Dec. (Maldonado campaign letter and advertisements).

The Santa Maria Times, which had endorsed two Anglo candidates in each of the three previous two-seat elections, endorsed only one candidate in 1994, the incumbent Orach. See Exhibit H to Rodriguez Dec. (editorial pages from Santa Maria Times showing their 1988, 1990, 1992 and 1994 endorsements). The newspaper provided no endorsement for the other seat in the election.

Maldonado was quoted in the Santa Maria Times, five days before the election -- November 3, 1994 -- as saying that if he were elected it would "show that the city is not racist. Some parties in this lawsuit don't want to see a Hispanic on the city council until after the suit is settled." See Exhibit I to Rodriguez Dec. (11/3/95 Santa Maria Times article entitled "Hispanic candidate gets threatening letter.")

Centeno and Maldonado received more than three times the non-Hispanic financial support than received by any previous Hispanic candidate and, as explained above, received endorsements from Anglo political leaders who had never before endorsed Hispanics.[3] In 1994, Maldonado received $6,625 from non-Hispanic individuals or non-Hispanic owned businesses for his campaign. See Exhibit J of Rodriguez Dec. (summary of racial background of contributors to Hispanic candidates) Centeno also received an unprecedented amount of financial support from non-Hispanics. In 1994, he received approximately $4,550 from non-Hispanic individuals or businesses. Id The amount of financial support provided to Hispanic candidates from non-Hispanics in any previous election had not exceeded $790. Id.

Influential endorsement organizations that had in the past never endorsed a Hispanic did so in 1994. The Committee to Improve North County ("Committee"), an organization comprised of business people and the informal political action committee of the Santa Maria Chamber of Commerce, for the first time endorsed a Hispanic candidate. The Committee's endorsement is important because it signals who the business community supports. See Beneditti Deposition 33-36; 10/4/95 Zacarias Deposition 50 In 1994, they endorsed Centeno. See Centeno Deposition 45, Committee INC also encouraged and supported Maldonado's candidacy. See August 21, 1995 Deposition

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[3] Hispanics remained consistent in their support for Hispanic candidates. See Exhibit C to Rodriguez Dec.

Testimony of Ben Hawkins 17-18, 29, Exhibit X to Rodriguez Dec. (hereinafter "Hawkins Deposition"). Moreover, they issued a press release supporting Maldonado's election -- even though they had not officially endorsed him -- and announcing their endorsement of Centeno. Id.. They also sent a mailer to their members informing them that the board of directors had endorsed Centeno. Id. at 28, 30-31. Committee INC also paid for an advertisement in the Santa Maria Times within a week of the election informing the public of the Centeno endorsement. Id. at 26. Prior to 1994, Committee INC had not endorsed or supported the election of any Hispanic to the city council. See October 9, 1995 Fletcher Deposition 18.

According to Ben Hawkins, the secretary of the group, the board of directors had to convince Centeno to come out of his comfortable retirement to run. See Hawkins Deposition 19-24. Committee INC met in July with Centeno, Maldonado, Roger Bunch and Trent Beneditti but did not meet with other candidates until after September, and then it was only to interview them for possible endorsement. Id. at 21, 25-26.

The Santa Maria Firefighters Political Action Committee ("SMFF") -- although only formed in 1992 -- was also an important endorsement for candidates. See Deposition Testimony of Roger Bunch 25, Exhibit W to Rodriguez Dec. Prior to 1994, the SMFF had not endorsed a Hispanic candidate. See Deposition Testimony of Thomas Crakes 13, Exhibit Y to Rodriguez Dec. In 1994, the SMFF endorsed Centeno. Id. at 9. The SMFF published advertisements in the Santa Maria Times informing the public of the Centeno endorsement, and SMFF members campaigned for him. See Centeno Deposition 10, 46

In 1994, Maldonado spent approximately $36,000 on his campaign for the city council. See Exhibit C to Rodriguez Dec. He loaned himself $16,000. Id. This was three times the highest amount spent on a councilmanic election in Santa Maria history

and three times as much as any other candidate in 1994. See Engstrom Report 21. And yet, he only won by 84 votes.

Moreover, although Dr. Engstrom acknowledged the strength of Centeno's candidacy, it is his opinion that given the consistent pattern of dilution of Hispanic vote in previous elections and the unique circumstances surrounding the 1994 elections, the results of that election did not cleanse the at-large system of its dilutive effect on Hispanic votes. See Engstrom Report.

16. Defendants contend that Abel Maldonado is a young Hispanic businessman and Republican who grew up in Santa maria, whose family has been in Santa Maria for years. He spent more money and put up more signs than anyone else." [Defs. Facts #19]

It is also undisputed that in 1994, Maldonado was twenty-six years old and had never been involved in any civic, political or community organizations in the city of Santa Maria. See Maldonado Deposition at 35-36 He had no experience running for elected office, not even in high school or college. Id. at 10, 14. He "wasn't a good speaker" and attended only three candidate forums. Id. at 42:15 - 43:2. In his own words: "[n]obody knew Abel Maldonado." Id. at 19:7-10 Moreover, none of the campaign workers on Maldonado's campaign had ever worked on a campaign before. Id. at 28-29, 32-33.

17. Defendants claim that "Plaintiff Joe Talaugon "was not surprised Centeno won." [Def. Facts. #20]

Plaintiffs do not dispute this factual contention but contend that Mr. Talaugon's explanation as to why he was not surprised is relevant. Directly following the series of questions and answers that Defendants cite in support of this contention are the more important answers where Mr. Talaugon explains why he was not surprised Centeno was elected. Mr. Talaugon was not

surprised Centeno was elected because, in his view, he received "the Anglo vote." October 4, 1994 Deposition Testimony of Joseph Talaugon 59, Exhibit JJ to Rodriguez Dec. (hereinafter "Talaugon Deposition").

He believes Centeno received support from Anglo voters because he was "their favorite son," because of his law enforcement background and because he "didn't specifically . . . make an issue out of any Latino issue . . ." Id. at 59, 63. Mr. Talaugon was also suspicious of Centeno's candidacy: "Mr. Centeno . . . came from the Board of Trustees of the Hancock College, vacated his seat to run for City Council when the atmosphere in the community was district elections, you know, Latinos not having fair representation, so here comes Mr. Centeno as a candidate, who would, in a sense, be that Latino that would fill -- you know, like I say, 'Well, you know, here's a Latino.'" Id. at 58.

While Centeno may have been an appealing candidate to both Hispanics and non-Hispanics, Mr. Talaugon's opinions reinforce Plaintiffs arguments regarding "special circumstances." Mr. Talaugon believes Centeno won because he received votes from Anglo voters, which he could only do if he did not identify himself with Latino issues. Centeno publicly announced that he opposed district elections and he refused to take a position on Proposition 187. See Centeno Deposition 50, 64-66 Because Centeno had unprecedented support from non-Hispanic political leaders and influential organizations, he was able to receive the unprecedented amount of non-Hispanic voter support.

18. Defendants claim that there is no evidence that "Anglos voted for Maldonado to end the lawsuit, or that Anglos endorsed them or contributed money to their campaigns to end the lawsuit." [Defs. Facts #20]

Plaintiffs contend this statement concerning the absence of certain facts or evidence is irrelevant to this case and this

motion. Plaintiffs are not required to show an intent to moot the lawsuit, by the voters or by the Anglo influential politicians, businessmen and other citizens in order for a court to find that the election of minority candidates is due to "special circumstances." (See, Plaintiffs' Opposition to Defendants' Summary Judgment Motion, Section IV.C.)

19. Defendants claim that "None of the candidates believed that the lawsuit affected the outcome of the 1994 election." [Defs. Facts #20]

While Plaintiffs do not dispute that the candidates did not think the lawsuit affected the outcome of the 1994 election, we do contend that the lawsuit had an impact on the election outcome. The question of whether candidates supported district elections was raised in at least one public forum. Centeno and Maldonado both stated their opposition to district elections. See Centeno Deposition 55, Maldonado Deposition 43-44. Moreover, the lawsuit was mentioned in the local paper just five days before the election. Maldonado was quoted in the Santa Maria Times as saying that if he were elected it would "show that the city is not racist. Some parties in this lawsuit don't want to see a Hispanic on the city council until after the suit is settled." See Exhibit I to Rodriguez Dec. None of the candidates were asked whether Maldonado's quote had an impact on the outcome of the 1994 election. Hilda Zacarias, on the other hand, believed that the coverage did have an impact on the outcome:

> I thought that was a wonderful political move, because if there were any people or if there are still people who would not have voted for him because they were not Latino, he's set himself apart from these other Latino efforts and he's said that 'By voting for me, you're proving that you're not racist,' and I think that's a statement that many people in this city would like to send, even though I feel that doesn't change the reality.

Zacarias Deposition at 100-101 Thus, Plaintiffs dispute this contention.

20. Defendants contend that "newcomer" Hispanics ran against candidates who were "strong" and "experienced," with "longstanding records of service and high name recognition." [Defs. Facts #21]

Most of the "facts," as distinguished from the conclusory statements and opinions, are not disputed by Plaintiffs. To the extent that the "facts" suggest that Hispanics were defeated in prior elections for reasons other than the discriminatory dilutive effect of the at-large system, Plaintiffs dispute this contention. Plaintiffs do not at this time plan to introduce evidence at trial that the winning Anglo candidates were weak or inexperienced, but Plaintiffs do intend to introduce evidence that the Hispanic candidates who ran and were not supported by the non-Hispanic majority were also "strong" and "experienced."

In 1988, there were four candidates for the city council, including Felix Martel, who is Hispanic. Martel had lived in the Santa Maria Valley since 1972, worked in law enforcement, and was active in community service organizations like the Central Coast Coordinating Committee. See August 5, 1993 Deposition Testimony of Felix Martel pp. 5, 7, 10-11, attached as Exhibit K to Rodriguez Dec. (hereinafter "Martel Deposition"). He walked precincts, passed out mailers and posters, did a T.V. commercial and participated in candidate forums. Id. at 26 - 27. Martel received votes from 45.6 % of Hispanic voters and 15.7 % of non-Hispanic votes. See Engstrom Report 6. He was the least preferred candidate of non-Hispanic voters. Id. at 31. Thomas Urbanske and Dan Firth won the two seats to the Council. Martel came in last.

Estimated Racial Division in Candidate Preferences
1988 Councilmanic Election

	Candidate	% of Non-Hispanic Signing-in	% of Hispanics Signing-in
[Elected]	Urbanske	61.4	49.5
	Martel	15.7	45.6
	Snyder	34.6	27.4
[Elected]	Firth	46.7	4.2

See Engstrom Report at p. 31

At a 1990 luncheon sponsored by the Economic Development Association, Mayor George Hobbs made comments about Santa Maria's "Mexican problem. See Exhibit A to Rodriguez Dec. (7/17/90 Santa Maria Times newspaper article describing Hobbs' comments) The mayor's comments motivated the Hispanic community to come together to respond to his attacks upon their community. See March 15, 1994 Deposition Testimony of Hilda Zacarias 62-64, Exhibit U to Rodriguez Dec. A multi-racial coalition seeking an apology from the mayor formed the Committee for the Betterment of the Santa Maria Valley. Id. Mayor Hobbs described the organization as a "semi-secret militant Mexican organization that has as their plan to take over the politics of the state of California within 10 years." See Exhibit B to Rodriguez Dec. (8/8/90 Santa Maria Times article with quote); See also August 23, 1993 Deposition Testimony of George Hobbs 441-442, Exhibit O to Rodriguez Dec.

In the 1990 councilmanic elections, there were five candidates, one of whom was Hispanic. Gil Guevara spent over $7,000 in his campaign to get elected. See Exhibit C to Rodriguez Dec. (summary of campaign expenditures and donations) At the time, he was a member of the Planning Commission and ran his own marketing firm. See Deposition Testimony of Gil Guevara 11-12,

21-22, Exhibit M to Rodriguez Dec. Guevara, a Republican, had been active in the Santa Maria Valley promoting Pete Wilson's U.S. Senate campaign and first run for the Governor's seat in 1990. Id. at 10. Guevara has resided in Santa Maria since the early 1970s. Id. at 10.

Guevara walked precincts, advertised, sent mailers, and attended all the forums. Id. at 30-33, 41-42. He also received the endorsement of the Committee for the Betterment, an endorsement he did not seek because he feared that Hobbs' opposition to the group would hurt his chances with non-Hispanic voters. Id. at 37-38. He stressed leadership, affordable housing, traffic, and child care issues. Id. at 33. Guevara was the overwhelming choice of the Hispanic voters; he received 66.2 % of their votes. See Engstrom Report at 7. He was the least-preferred among non-Hispanics, however, and only received 8.6 % of non-Hispanic votes, less than one-third the vote for any other candidate. Id. at 32. Robert Orach and Curtis Tunnell won the two seats.

Estimated Racial Division in Candidate Preferences
1990 Councilmanic Election

	Candidate	% of Non-Hispanic Signing-in	% of Hispanics Signing-in
	Guevara	8.6	66.2
	Engel	27.2	23.1
	Droegemeier	26.3	20.5
[Elected]	Tunnell	49.0	12.8
[Elected]	Orach	48.4	8.7

See Engstrom Report at p. 32.

In the mayoral race, Margie Lopez and Fernando Castillo both sought to unseat George Hobbs, who had been mayor for almost thirty years. Another candidate, Rod Rodenberger, withdrew

from the race just four days after filing his candidacy papers -- two and one-half months before the election. See Exhibit D to Rodriguez Dec. (8/13/90 Santa Maria Times article discussing Rodenberger withdrawal). His name still appeared on the ballot.

Margie Lopez outspent her opponents handily. She raised over $11,000 while George Hobbs raised about $700.[4] See Exhibit C to Rodriguez Dec; George Hobbs July 7, 1995 Deposition Testimony 33-34, Exhibit O to Rodriguez Dec. She walked precincts, advertised on the radio, passed out campaign literature and was well known in the Hispanic community because of her participation in many community-based groups. See Deposition Testimony of Margie Lopez 28 -30, 33-36, 60, 62, 84 Exhibit N to Rodriguez Dec. (hereinafter "Lopez Deposition") Lopez received an overwhelming amount of support from Hispanic voters; 42.6 % cast ballots for her. See Engstrom Report at 4. On the other hand, non-Hispanics were unified in opposition to her candidacy; she only received votes from 6.6 percent of non-Hispanic voters. Id. at 7.[5]

Fernando Castillo was a conservative businessman who had the support of agri-business. See Deposition Testimony of Fernando Castillo 7, 10, 54, Exhibit P to Rodriguez Dec. (hereinafter "Castillo Deposition") In his campaign, he stressed the issues of state water, affordable housing, and latch-key kids. Id. at 55. He walked

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[4] George Hobbs took pride in the fact that the only campaigning he did -- aside from attending some candidate forums -- was to put a campaign mailer in mailboxes the week before the election. See 8/23/93 Hobbs Deposition 370 -375, 409-410, 426-427, 430. Because Hobbs never filed any financial disclosure forms, it is unclear how much money he actually raised, but he believes that he usually spent around $700. See Hobbs July 7, 1995 Deposition Testimony 40.

[5] Margie Lopez also felt that Hobbs' statements impacted her ability to garner non-Hispanic votes. See Lopez Deposition 80-81.

precincts all over town, distributed mailers, advertised on radio, television, and in newspapers. Id. at 20-21. He received the endorsement of the Young Republicans, and spent over $5,000 on his campaign. Id. at 19, 54; Exhibit C to Rodriguez Dec. As a result of his efforts, he received 28.3 % of the vote from Hispanic voters and 5.1 % from non-Hispanic voters. Engstrom Report at 30.

In comparison, George Hobbs, who won re-election, did not walk precincts, and only sent out one mailer. See Hobbs Deposition 370-375, 409-410, 426-427, 430, He received 13.3 % of the votes from Hispanics and an overwhelming 71.4 % from non-Hispanic voters. See Engstrom Report at 30.

Rod Rodenberger, who had not run a campaign and had formally withdrawn from the mayoral race two months before the election, received 16.9 percent of the vote from non-Hispanics' more than twice the support provided Lopez and three times as much as Castillo, despite their strong efforts. Id.

Estimated Racial Division in Candidate Preferences
1990 Mayoral Election

	Candidate	% of Non-Hispanic Signing-in	% of Hispanics Signing-in
	Lopez	6.6	42.6
	Castillo	5.1	28.3
	Rodenberger	16.9	15.8
[Elected]	Hobbs	71.4	13.3

See Engstrom Report at p. 30.

In 1992, Fernando Castillo was one of seven candidates seeking a seat on the city council. Castillo spent about $1600 on his campaign. See Castillo Deposition 54; Exhibit C to Rodriguez Dec. In 1992, as in 1990, the issue of the "Mexican problem" was raised,

this time by Toru Miyoshi. Miyoshi produced and distributed a flyer stating his commitment to address the "Mexican problem." See Exhibit E to Rodriguez Dec.(copy of Miyoshi flyer) Castillo felt that the media made this a prominent issue. See Castillo Deposition 24-26, Despite the fact that he received endorsements from pro-life organizations, that the issue was an important one in the campaign, and that the other candidates had the same position, Castillo came in last. Id. at 34-36. As in 1990, non-Hispanics overwhelmingly disapproved of his candidacy and only provided him with 4.7 % of their votes, about one-quarter of the amount of support for Stephen Jerger who was the next-to-last preferred candidate and who spent even less money on his campaign. See Engstrom Report at 7, 33; Exhibit C to Rodriguez Dec. In fact, Castillo received less votes from non-Hispanics in 1992 than he had in 1990. Engstrom Report at 30, 33. Hispanics, on the other hand, provided Castillo with 35.9 percent of their votes, a higher level of support than he had received in 1990. Id. at 7. As in the previous election, the non-Hispanic voters, who cast 82.1 % of the ballots in this November election, vetoed the Hispanic candidate favored by the Hispanic voters. Id. Urbanske and Miyoshi won the two seats on the council.

Estimated Racial Division in Candidate Preferences
1992 Councilmanic Election

	Candidate	% of Non-Hispanic Signing-in	% of Hispanics Signing-in
[Elected]	Urbanske	50.4	38.4
	Castillo	4.7	35.9
[Elected]	Miyoshi	35.5	31.5
	Anderson	12.1	28.3
	Varni	28.3	12.8
	Firth	36.4	-4.7
	Jerger	13.3	-1.1

See Engstrom Report at p. 33.

Defendants would explain these widely divergent voting patterns as simply a reflection of candidate qualities. In other words, they believe that Hispanics lost from 1988 to 1992 because they were not good candidates and because they faced strong opponents.[6] See Def.'s OSC Brief at 13. This argument only supports the existence of the racially polarized voting that the Voting Rights Act prohibits. Hispanics perceived the candidacies of Martel, Guevara, Lopez, and Castillo as strong and provided them much support. Non-Hispanics, on the other hand, did not so view them.

Finally, Martel was not a "newcomer" to the community. Martel had lived in the Santa Maria Valley since 1972, worked in law enforcement and was active in community service organizations, like the Central Coast Coordinating Committee. See Martel Deposition 5, 7, 10-11. Additionally, Lopez, while not a native of Santa Maria, had been very active in community organizations. See Lopez Deposition 28-30, 33-36, 60, 62.

21. Defendants contend that in 1994 Orach "hurt himself by first declaring for mayor but then, when George Hobbs who people thought was retiring announced for mayor, Orach changed his mind and declared for council." [Defs. Facts #21]

Plaintiffs do not dispute this fact, and indeed believe that it supports their position that the 1994 election is not indicative of

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[6] Defendants argue that the election of non-Hispanic candidates and the losses of Hispanic candidates are due to non-racial reasons: Hispanic candidates did not run viable campaigns. This is an affirmative defense to the polarization analysis presented by Plaintiffs, which Defendants have the burden of proving on a motion for summary judgment. Continental Airlines Inc. v. Intra Brokers, Inc., 24 F.3d 1099, 1103 (9th Cir. 1994). The viability of the Hispanic candidacies is a question of fact which Plaintiffs dispute. Thus, as to this defense, there exists a genuine issue of material fact precluding summary judgment.

Hispanics' ability to elect at-large. Despite the unusual and unprecedented endorsements for Maldonado, despite the previously unheard of amount of money spent by Maldonado, despite the fact that Orach "hurt himself," in the election, Maldonado only beat Orach by 84 votes. Orach "hurting himself" is one of the special circumstances alleged by Plaintiffs in the 1994 election.

22. Defendants claim that "Non-Hispanics or Anglos would be a majority of the voting age citizens in the other three districts." [Defs. Facts #22]

Plaintiffs do not at this time dispute this fact, although it may be possible to draw two Thornburg districts in Santa Maria, and the statement would no longer be true. However, Plaintiffs contend that Defendants' contention is legally irrelevant to the issues to be determined at trial and in this summary judgement motion.

23. Defendants make factual claims about the pre-1994 Hispanic registration rates in Plaintiffs' Thornburg district. [Defs. Facts #23]

Plaintiffs contend that Defendants' contention is legally irrelevant to the issues to be determined at trial and in this summary judgement motion.

24. Defendants claim that no vote dilution occurred in the 1994 election. [Defs. Facts #24]

Plaintiffs do not dispute this fact. No vote dilution occurred in the 1994 election because for the first time ever, the majority electorate (non-Hispanics) did not bloc vote against the Hispanic candidates. Plaintiffs do contend that the 1994 election is a post-litigation election characterized by special circumstances about which there is much dispute by the parties, and their election does not cure the system of its discriminatory effects. See Enstrom Report and #15 above and accompanying citations

25. Defendants claim that Hispanics in Santa Maria and in the state strongly opposed Proposition 187, and that Proposition 187 was nonetheless approved in Santa Maria and in Plaintiffs' Thornburg district. [Defs. Facts #25]

Plaintiffs do not dispute that Hispanics strongly opposed Proposition 187 in Santa Maria and statewide, and that Proposition 187 nonetheless passed in Santa Maria. Plaintiffs believe that this fact supports Plaintiffs' contention that non-Hispanic bloc voting vetoes the choice of the Hispanic community, that the 1994 vote on Proposition 187 is further evidence that despite the special circumstances surrounding the 1994 city council election, voting in Santa Maria continues to be highly polarized, and that the election of two Hispanics did not cure the system of its discriminatory effect on Hispanics. Hispanics clearly do not have the ability to elect at-large absent special circumstances, as evidenced by the passage of Proposition 187 despite overwhelming cohesive opposition by Santa Maria's Hispanic voters. See Engstrom Report.

Plaintiffs do dispute that Proposition 187 also passed in Plaintiffs Thornburg district, because of the unsound methodology used by Defendants' expert, Dr. Morrison, in recalculating prior elections in a hypothetical district. When precinct lines cross the hypothetical district lines, i.e. when only a piece of any given precinct is within the district, Dr. Morrison looks at a map, and "eyeballs" the precinct to decide whether to assign 25%, 50%, or 75% of the precincts' votes to the district. He then uses that percentage to assign a portion of the votes to the district, without regard to whether the precinct's voters inside the hypothetical district voted any differently from those outside the hypothetical district. See April 11, 1994 Deposition Testimony of Peter Morrison pp. 98-99, Exhibit II to Rodriguez Dec.; Morrison Deposition at 78; Engstrom Supplemental Report.

Plaintiffs further contend that using results from an at-large election and imposing them on a single member district is inappropriate. It cannot accurately reflect the way the Hispanic

electorate will vote when given the effective opportunity to elect a preferred Hispanic candidate without being defeated by Anglo bloc voting in an at-large election. See Engstrom Supplemental Report.

26. Defendants claim that neither Maldonado nor Centeno live in plaintiffs' Thornburg district. [Defs. Facts #26]

Plaintiffs do not dispute this fact, but claim that it is legally irrelevant to the issues to be decided in this motion and in this case.

IV. CONCLUSION

For the reasons stated above, there exists genuine issues of material fact to be resolved in this case. The court should deny Defendants' motion for summary judgment.

Respectfully Submitted,

/s/

Irma Rodríguez
Attorney for Plaintiffs

Supreme Court, U.S.
FILED
MAY 26 1999
CLERK

(3)

No. 98-1666

In the Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF SANTA MARIA, CALIFORNIA, ET AL.,
Petitioners,

v.

ESPERANZA RUIZ, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner City of Santa Maria ("Santa Maria"), respondent in *Ruiz v. City of Santa Maria*, No. 96-56564 (9th Circuit Court of Appeals), seeks a writ of certiorari ("Petition") ordering the deletion of parts IV.B and IV.D of the Ninth Circuit panel majority opinion ("Opinion") issued in this case on November 5, 1998. The Opinion reversed a trial court ruling dismissing this Section 2 Voting Rights Act case challenging Santa Maria's at-large election system, and remanded it back to the district court for trial. (The Opinion appears at App., 1a-35a, in Santa Maria's Petition.)

One of the panel members (Wallace, J.) dissented from parts IV.B and IV.D of the Opinion, which set forth evidentiary standards intended to guide the trial court on remand. The continued inclusion of parts IV.B and IV.D in the Opinion will produce legally unsound results in this and other Voting Rights Act cases, as well as undermine the validity of previous Voting Rights Act decisions in the Ninth Circuit. (Petition, p. 15.)

Part IV.B of the Opinion contains the unprecedented holding, contrary to existing Supreme Court and Circuit Court of Appeal cases, that the trial court should give less evidentiary weight to the success of an Anglo candidate who was Hispanic voters' first choice than to the defeat of an Hispanic candidate who was Hispanic voters' second preference, *solely on account of race*. Part IV.D of the Opinion authorizes the trial court to discount elections which Hispanic candidates won, on grounds of "special circumstances" allegedly due to pending voting rights litigation, solely because Anglo voters gave more votes and financial support to those candidates than to previous Hispanic candidates, without determining whether the greater

Anglo support was an attempt to thwart the lawsuit or was simply a reaction to the quality of the candidates, strength of the campaigns or other *nonracial* factors.

The Petition seeks deletion of these two legal holdings because they are contrary to and overlook the established voting rights jurisprudence of this Court, and other Circuit Courts of Appeal, and raise issues of exceptional importance on rules of national application as to which there is a need for national uniformity. The Petition, then, fully satisfies the requirements of Supreme Court Rule 10. Respondents, however, improperly seek to reframe these legal rulings that are contrary to this Court's voting rights decisions into disputed factual issues that are plainly irrelevant to the legal issues presented in the Petition.

I. THE PANEL MAJORITY, IN ACCORDING MORE EVIDENTIARY WEIGHT TO LESSER PREFERRED HISPANIC CANDIDATES THAN TO MORE PREFERRED ANGLO CANDIDATES SOLELY BECAUSE OF THEIR RACE, CONFLICTS WITH SETTLED VOTING RIGHTS JURISPRUDENCE

The Panel majority, Petitioners and Respondents all agree that Anglo candidates can be the preferred candidate of minority voters. Numerous cases, including Supreme Court and Ninth Circuit cases, so hold. (Opinion, App., 12a-13a.)

In all the hundreds of decided voting rights cases, however, *not one* (until now) has ever held that less weight should be accorded to an Anglo candidate who was the first preference of minority voters and won, than to a minority candidate in the same election who was the second preference of minority voters and lost, *solely on account of the candidates' race*. In effect, the Panel majority announces

a new rule that Anglo candidates can be the preferred choice of minority voters, even the first choice, but the electoral success of such candidates is without legal consequence in a Section 2 Voting Rights Act "vote dilution" analysis under *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986), if lesser preferred minority candidates also do not win in that same election. This unprecedented new legal standard cannot be squared with existing Supreme Court precedent, and thus merits review by this Court.

Respondents attempt to confuse the issue before the Court by offering up inapposite cases that give more evidentiary weight to minority-Anglo contests than to elections with only Anglo candidates, *see, e.g., Rural West Tenn. African American v. Sundquist,* 29 F. Supp. 2d 448, 456 (W.D. Tenn. 1998) (black-white elections more probative than white-white elections), or that involve multiple seat elections with only one minority candidate preferred first so that minorities must necessarily prefer an Anglo candidate second. (See Oppos., p. 8.) Those are not the facts of this case. The issue before this Court concerns elections with Anglo and minority candidates in which *minorities preferred an Anglo candidate over a minority candidate.* The cases regarding non-racially contested elections cited by plaintiffs are irrelevant. Respondents, in effect, simply fail to answer, or answer adequately, the dispositive legal contentions presented in the Petition:

1. **Racial Stereotyping.** The most dramatic reason why the Opinion's new legal standard, giving more weight to lesser preferred Hispanic candidates than to more preferred Anglo candidates solely on the basis of race, is contrary to law, is the Supreme Court's admonition against racial stereotyping. (Petition, p. 13.) Respondents' Opposition (p. 8) barely responds to this seminal Supreme Court rejection of "political apartheid," offering only the glib,

conclusory statement that this Court's ruling will not "hamper" the District Court's ability to determine if minority voters' ability to elect their chosen representatives is inferior to white voters. This comment begs the question and is wholly nonresponsive to Santa Maria's argument that the majority's ruling is unconstitutional and contrary to Supreme Court precedent. This conflict with Supreme Court authority raises an issue of exceptional importance that warrants review by this Court.

2. **Minority Voter Cohesion.** The second of the three essential preconditions set forth in *Thornburg* for a Section 2 Voting Rights Act case is minority voter political cohesion. *Id.* at 50-51. As noted in the Petition (pp. 16-17), the Panel majority's new legal standard conflicts with this requirement, as it would turn minority losses in 1988 and 1992 due to lack of cohesion into ones that can be characterized as due to vote dilution. Suppose Hispanic voters were not cohesive and supported Anglo candidates as frequently as Hispanic candidates. Suppose it were always true that Hispanic voters gave more votes to Anglo candidates than to Hispanic candidates. The majority opinion plainly overlooked *Thornburg*'s "cohesion" requirement, which part IV.B does not even address. Nor do Respondents address this conflict with *Thornburg*, which merits review by this Court.

3. **Totality of Circumstances.** Petitioners (at pp. 16-17) also noted that the Panel majority's new legal standard contravenes the "totality of the circumstances" test mandated by *Johnson v. De Grandy*, 512 U.S. 997, 1009-13, 114 S. Ct. 2647, 2656-58 (1994). Suppose the controlling Anglo power structure organizes to support a captive Hispanic candidate only lukewarmly supported by Hispanics and who loses, while an Anglo candidate married to an Hispanic and enthusiastically supported by Hispanics wins.

The majority's standard would turn a triumph for Hispanics into a defeat. This is the fundamental problem with the majority's legal standard: it turns what should be a fact specific, case by case inquiry into a generally applicable legal standard, regardless of the facts pertaining to a specific election as to which its application would not make much sense. Respondents do not address this conflict with *Thornburg*'s totality of circumstances inquiry (nor does part IV.B), which merits review by this Court.

4. **Vote Dilution.** Petitioners noted (at p. 17) that the majority's new legal standard conflicts with *Thornburg*'s ultimate vote dilution conclusion by giving more weight to an unsuccessful second preference who would not have been elected anyway because Hispanics could form but one majority single member district. (Petition, pp. 7-8, 17-18). Thus, by definition, the defeat of the second Hispanic candidate cannot constitute "vote dilution." (*Id.* at 17-18.) What matters in this case is who the first preference was and whether that preference won, not that the second preference lost.

Again, Respondents (and part IV.B) are silent on this conflict with *Thornburg* except to note that historically Hispanics had not been elected to the City Council when their portion of the City's population was much less. (Petition, p. 7.) This case is very similar to *Aldasoro v. Kennerson*, 922 F. Supp. 339, 360, 362 (S.D. Cal. 1995), in which Hispanic candidates had lost at-large, but eventually won because Hispanic voters achieved the ability to elect at-large through changing demographics, so that there was no current condition of vote dilution at the time of trial. More recent elections like those in 1994, then, are more probative of whether a *current* condition of vote dilution exists, if there have been significant demographic changes that improve a minority group's ability to elect at-large as is true in this

case. (Petition, pp. 19-20.) The historical Hispanic candidate losses cited by plaintiffs, moreover, were unaccompanied by any analysis of whether these unsuccessful Hispanic candidates were the preferred candidates of Hispanic voters and thus are of no probative value. *Valladolid v. City of National City*, 976 F.2d 1293, 1297 (9th Cir. 1992) ("appellants too easily equate the presence or absence of minority individuals on the council with the victory or defeat of minority peferred candidates").

5. **Ninth Circuit Decisions.** Respondents did not respond to the point in the Petition that cases decided in the Ninth Circuit perhaps would have been decided differently under the majority's new legal standard, and thus the Opinion in effect undermines the validity of these previously decided cases, unless part IV.B is deleted from it. (Petition, pp. 9, 15.)

6. **Gomez.** In *Gomez v. Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080, 109 S. Ct. 1534 (1989), the Ninth Circuit established the rule, consistent with *Thornburg*'s minority political cohesion requirement, that cohesion is to be determined on the basis of "voting preferences expressed in actual elections" (*id.* at 1415) and that courts are to look "only to *actual voting patterns*" (*id.* at 1416). The Panel majority's legal standard, by giving more weight to lesser preferred minority candidates conflicts with *Gomez* and denies the legitimacy of expressed minority voter preferences. Respondents ignore *Gomez* completely.

7. **The Sixth Circuit.** The Panel majority claims that the only case to address the issue of whether more weight should be given to minority preferred candidates who lose is *Clarke v. Cincinnati*, 40 F.3d 807 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109, 115 S. Ct. 1960 (1995). Petitioners, however, distinguished *Clarke* by noting that it

never makes clear whether black preferred Anglo candidates received greater black support than losing black candidates (Petition, p. 15), an argument to which Respondents do not respond.

The Panel majority also overlooked the recent Sixth Circuit case of *Cousin v. Sundquist*, 145 F.3d 818, 825 (6th Cir. 1998) which squarely rejects the Panel majority's new standard ("The proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority preferred candidates, whatever their race, usually lose"). Respondents mischaracterize *Cousin* as simply continuing the 6th Circuit practice of examining all elections. *Cousin*, however, is plainly at odds with the Opinion which overlooked it.

The Petition gave seven compelling reasons why a writ of certiorari should be granted. Respondents barely respond at all to three of those arguments (racial stereotyping, cohesion, totality of circumstances), sidestepped three others with no comments or nonresponsive comments that never actually address the substantive conflict with prior authority (vote dilution, Ninth Circuit cases, *Gomez*) and mischaracterize and minimize a recent Sixth Circuit opinion directly contrary to the Opinion which overlooked it. Respondents offer up inapposite cases and irrelevant factual material that are simply not responsive to these arguments.

II. THE PANEL MAJORITY'S SPECIAL CIRCUMSTANCES ARGUMENT OVERLOOKS SETTLED VOTING RIGHTS JURISPRUDENCE

The Panel majority held that the District Court may disregard minority electoral successes based on the "special circumstance" of *pending litigation* solely because of

increased Anglo voter support for minority candidates, without examining the reasons for that increased support to determine if the reasons were *nonracial*. Once again, Respondents fail to respond, or to respond adequately, to the arguments advanced in the Petition that the Panel majority's new standard conflicts with controlling Supreme Court and voting rights case authority:

1. **On Account of Race or Color.** The Petition (pp. 20-22) establishes that under the express language of Section 2 plaintiffs must demonstrate that a minority electoral defeat (or "special circumstances" success) occurred "'*on account of race or color*,' . . . not on account of some other racially neutral cause." *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083, 115 S. Ct. 1795 (1995). The Ninth Circuit adopted this construction of the Section 2 Voting Rights Act vote dilution claims in *Smith v. Salt River Project Agr. Imp.*, 109 F.3d 586, 596 (9th Cir. 1997). *All* vote dilution claims require proof that electoral losses occurred on account of race or color, in the absence of which federal courts have no jurisdiction. *Nipper*, 39 F.3d at 1515-16.

The Panel majority's new "special circumstances" legal standard for disregarding minority successes due to pending litigation necessarily conflicts with this mandatory statutory and jurisdictional "on account of race or color" requirement. The Panel majority opinion specifically permits the District Court to discount a minority electoral success due to pending litigation without proving *any relationship* between increased Anglo support for Hispanic candidates (which plaintiffs' experts *admitted* could be explained by factors other than pending litigation) and the pending litigation. This compelling conflict with Supreme Court, Ninth Circuit, and other Circuit authority, which Respondents fail to address, merits review by this Court.

2. **Causation.** The Panel majority's statement that motive to thwart a pending lawsuit "has no part in a vote dilution claim" is directly contrary to Supreme Court and other voting rights cases and is manifestly erroneous. Justice O'Connor's view in *Thornburg* that the causation, or the reasons why voters vote as they do, is relevant to the overall vote dilution inquiry now commands a majority on the Supreme Court. (Petition, pp. 21-22.) Numerous cases have considered evidence of motive to thwart a lawsuit to be relevant, including *Thornburg*, and the lack of such evidence was dispositive in other Circuit decisions. *Id.* Respondents *never* address the Supreme Court's causation jurisprudence with which the Panel majority obviously conflicts, other than to assert that the Fourth Circuit finds motive irrelevant, *Collins v. City of Norfolk*, 816 F.2d 932, 938 (4th Cir. 1987). The Fourth Circuit, however, has now adopted the *Nipper* "on account of race or color" vote dilution analysis developed after *Collins*, rendering *Collins* of little weight. (Petition, p. 22.) This conflict with *Thornburg*, *Johnson*, *Smith* and *Nipper* warrrants review by this Court.

3. **Qualifications of Candidates.** Respondents wrongly state that part IV.D of the Opinion instructs the District Court to consider all relevant evidence. (Opposition, pp. 1,2,4, and 8). In fact, the Panel majority's new "special circumstances" pending litigation standard not only limits relevant evidence to increased Anglo support of Hispanic candidates but specifically holds irrelevant any evidence that increased Anglo support was due to *nonracial* factors such as the qualifications of the candidates and the strength of the campaigns they run (which plaintiffs' expert admits may be true). This holding is unsupported by any legal authority, is directly contrary to the instruction in *Johnson*, *supra*, that courts must consider the totality of the circumstances before reaching a conclusion about vote dilution and completely overlooks numerous decisions that discount the electoral

defeats of weak, minor or nonviable candidates that would give a false impression of the ability of minority voters to elect candidates of their choice. (Petition, pp. 22-23.) Respondents *never* address the relevance of such evidence or the obvious conflict between the Panel majority opinion on this issue with the Supreme Court's decision in *Johnson*, an issue that warrants review by this Court.

CONCLUSION

Respondents' Opposition, when properly considered against the compelling arguments presented in the Petition, offers up inapposite cases and is largely nonresponsive, refusing to acknowledge the obvious conflict with Supreme Court, Ninth Circuit and other Circuit Court authority of parts IV.B and IV.D of the Opinion, that merit review by this Court in accordance with Supreme Court Rule 10.

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